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The Rule 11 Studies and Civil Rights Cases: An Inquiry into the Neutrality of Procedural Rules

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Over the past decade a serious challenge has arisen to an accepted feature of civil procedure, at least at the federal level—the promulgation of neutral rules by an apolitical committee of judges, lawyers and law professors.[1] This attack has come from Congress, interest groups, and academics. Part of this challenge was generated by the perception that there is a "crisis" affecting our civil litigation system. Part of it stemmed from the passage by Congress of the Civil Justice Reform Act of 1990.[2] But part of the challenge is related to a series of amendments to the Federal Rules of Civil Procedure, most notably the 1983 and 1993 amendments to Rule 11, as well as the 1993 amendments to Rule 26, the basic discovery rule.[3]

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1. Different commentators place different starting dates on this challenge. *See, e.g.*, Linda S. Mullenix, *Judicial Power and the Rules Enabling Act*, 46 MERCER L. REV. 733, 735 (1995) [hereinafter Mullenix, *Judicial Power*] (identifying Congressional passage of the Rules Enabling Act amendments in 1988 as the starting point); Stephen N. Subrin, *Teaching Civil Procedure While You Watch It Disintegrate*, 59 BROOK. L. REV. 1155, 1156-58 (1993) (stating that this new ideology emerged at the 1976 Pound Conference).

2. *See* Civil Justice Reform Act of 1990, Pub. L. No. 101-650, §§ 101-105, 104 Stat. 5089-98 (1990) (codified as amended at 28 U.S.C. §§ 471-482 (1994)). The Civil Justice Reform Act required each federal judicial district to adopt a cost and delay reduction plan. *See id.* § 472. The Act created concerns about increasing the lack of uniformity from district to district. *See* Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447, 1448 (1994) [hereinafter Robel, *Fractured Procedure*]. It also created concerns about the intrusion of Congress upon the rulemaking process. *See* Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 382 (1992) [hereinafter Mullenix, *Counter-Reformation*]; Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283, 1287 (1993) [hereinafter Mullenix, *Unconstitutional Rulemaking*].

3. The 1993 amendment to Rule 26 adopted a mandatory disclosure provision for certain discovery materials, but then made this requirement non-uniform by allowing local districts to opt-out of the rule. *See* FED. R. CIV. P. 26(a)(1). The Judicial Conference has recently voted to forward to the Supreme Court a rule change that would eliminate the opt-out provision of Rule 26(a)(1). *See* Adminis-

These rule changes sparked controversy about what constitutes an appropriate exercise of rulemaking power. They also provoked charges that the rulemaking process now favored one set of interests over another.[4] These, in turn, triggered counter-charges claiming that partisans of one side or the other had politicized the rulemaking process to the detriment of everyone else.

This article will discuss one central element of these debates—the controversy regarding neutral procedural rules. It will do so by focusing on the claim that the 1983 version of Rule 11[5] had a disproportionate impact upon civil rights cases, thereby violating the norm of procedural neutrality. By looking at this claim about the impact of Rule 11 on civil rights cases, we can evaluate whether the 1983 version of Rule 11 violated the norm of procedural neutrality, and also understand the different ways that the concept of procedural neutrality is used. This exploration will help us understand the larger debate regarding the neutrality of procedural rules and to make connections to similar debates in other areas of law, particularly constitutional law.

Rule 11 was amended, in 1983, to prevent abusive litigation behavior.[6] This amendment was a response to the claim that there were too many nonmeritorious cases.[7] Rule 11 had provided that a lawyer's signature on pa-

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trative Office of the United States Courts, *News Release* (last modified Sept. 15, 1999) <http://www.uscourts.gov/news.html> (providing the version of the rule change that was approved by the Standing Committee on Rules of Practice and Procedure in June 1999). An earlier version that was sent out for public comment is published in 181 F.R.D. 18, 57-61 (1999).

4. *See* Richard L. Marcus, *On Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 808 (1993) (discussing opposition to mandatory disclosure from both the plaintiffs' and defendants' bar); *see also* Rogelio A. Lasso, *Gladiators Be Gone: The New Disclosure Rules Compel a Reexamination of the Adversary Process*, 36 B.C. L. REV. 479, 498 (1995) ("[P]laintiff's and defendants' attorneys' groups each claimed that disclosures would unfairly benefit the others."). The debate over the 1993 version of the mandatory disclosure rule also stemmed from concerns over its lack of uniformity from district to district. *See generally* Lauren Robel, *Mandatory Disclosure and Local Abrogation; In Search of a Theory for Optional Local Rules*, 14 REV. LITIG. 49 (1994) [hereinafter Robel, *Mandatory Disclosure*].

5. The 1983 version of Rule 11 provided, in part:

> The signature of an attorney or party constitutes a certificate by [the signer] that [the signer] has read the pleading, motion or other paper; that to the best of [the signer's] knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

FED. R. CIV. P. 11 (amended 1983).

6. *See* William W. Schwarzer, *Sanctions Under the New Federal Rule 11- A Closer Look*, 104 F.R.D. 181, 181 (1985).

7. *See, e.g.*, Letter from William R. Mansfield, Chairman, Advisory Committee on Civil Rules, to Judge Edward T. Gignoux, Chairman, and to the Members of the Standing Committee on Civil Rules

pers filed in court certified that there was "good ground to support" the assertions within the paper and that the paper was "not interposed for delay."[8] The 1983 amendments to Rule 11 added a requirement that the lawyer make a reasonable inquiry into the facts and the law before filing court papers, thereby adopting an objective standard in contrast to the pre-1983 version's subjective standard. Moreover, sanctions now became mandatory upon a finding of violation, and they could be imposed upon the lawyer, the client, or both.

The effect of the 1983 amendment upon the number of Rule 11 cases was extraordinary. Under the old version, during the previous forty-five years, there were approximately 25 reported cases.[9] In ten years after the 1983 amendment, there were at least 6000 Rule 11 cases reported in computerized data bases.[10] The actual number of Rule 11 cases during this period may have been twice that figure.[11] Moreover, the impact of the 1983 amendments to Rule 11 was not limited to increasing the number of cases; the amendments also created controversy over whether the 1983 version of the rule affected certain types of claims more than others. In

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(Mar. 9, 1982), *reprinted in* 97 F.R.D. 190, 192 (1983) (stating that the amendments were intended to "reduce frivolous claims"). The 1983 amendment was part of a group of changes to the Federal Rules including amendments to Rule 16, the pre-trial conference rule, and the discovery rules. See *infra* notes 256-65 and accompanying text for a discussion of the evidence supporting the claim that there were too many non-meritorious cases.

8. The pre-1983 Rule provided:

> Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of the rule; it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

FED. R. CIV. P. 11 (later amended in 1983 and 1993).

9. *See* D. Michael Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 34 (1976). Risinger found 23 reported cases between 1938 and 1976. *See id.* at 34-35. Four of these cases were actually brought under FED. R. CIV. P. 12(f). *See id.*

10. *See* GEORGENE M. VAIRO, RULE 11 SANCTIONS: CASE LAW PERSPECTIVES AND PREVENTIVE MEASURES § 2.02(b), at 2-12 (2d ed. 1992) [hereinafter VAIRO, RULE 11 SANCTIONS]. During this ten-year period there were four Supreme Court cases: *Willy v. Coastal Corp.*, 503 U.S. 131 (1992); *Business Guides Inc. v. Chromatic Enterprises*, 498 U.S. 533 (1991); *Cooter & Gell v. Hartmark Corp.*, 496 U.S. 384 (1990); and *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120 (1989).

11. *See* STEPHEN R. BURBANK, AMERICAN JUDICATURE SOCIETY, RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11, at 98-99 (1989) [hereinafter THIRD CIRCUIT REPORT]. It was estimated by this study that fewer than four in ten of the Rule 11 cases were available through Lexis or Westlaw. *See id.* at 59.

particular, critics voiced concern about Rule 11's impact upon civil rights litigation.[12] A number of significant empirical studies of Rule 11 attempted to provide data about Rule 11's impact upon civil rights claims.[13]

These studies produced claims that Rule 11 had a "chilling effect" that deterred access to court in civil rights cases. Critics also argued that application of Rule 11 unfairly singled out civil rights cases as compared to other types of cases, thereby exhibiting what Judge Robert Carter called "substantive bias."[14] In so doing, Rule 11 violated the fundamental idea that procedural rules should be neutral vis-a-vis different types of substantive claims. Others argued, however, that the evidence supporting the disproportionate impact thesis was "slim."[15] They also maintained that the data that showed more civil rights cases were subject to sanctioning activity than other types of cases simply reflected the fact that civil rights cases

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12. *See, e.g.*, Arthur B. LaFrance, *Rule 11 and Public Interest Litigation*, 22 VAL. U. L. REV. 331 (1988); Melissa L. Nelken, *Sanctions Under Amended Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313 (1986); Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485 (1989) [hereinafter Tobias, *Rule 11 and Civil Rights Litigation*].

13. The principal empirical studies are: the Third Circuit Study, *see* THIRD CIRCUIT REPORT, *supra* note 11; a study conducted by the Federal Judicial Center, *see* FEDERAL JUDICIAL CENTER, RULE 11: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (1991) [hereinafter FJC STUDY]; a study by Professor Gerald Hess, *see* Gerald F. Hess, *Rule 11 Practice in Federal and State Court: An Empirical, Comparative Study*, 75 MARQ. L. REV. 313 (1992) [hereinafter Hess Study]; and a study conducted by the American Judicature Society, *see* Lawrence Marshall et al., *The Use and Impact of Rule 11*, 86 NW. U. L. REV. 943 (1992) [hereinafter AJS Study]. In addition to these four studies, there have been other "empirical" studies that have attempted to study various aspects of Rule 11. Although some of these studies offer interesting perspectives on Rule 11, none of them offer the "case data" which would allow study of the disproportionate impact thesis. *See, e.g.*, SAUL M. KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS (1985) (surveying federal district court judges' reactions to 10 hypothetical Rule 11 cases); NEW YORK STATE BAR ASS'N, REPORT OF THE COMMITTEE ON FEDERAL COURTS: SANCTIONS AND ATTORNEYS' FEES (1987) (surveying federal judicial officers and over 8,000 attorneys in New York state); THOMAS E. WILLGING, FEDERAL JUDICIAL CENTER, THE RULE 11 SANCTIONING PROCESS (1988) (interviewing judges in six federal district courts and with experienced federal practitioners in eight federal district courts, and analyzing a random sample of published opinions involving Rule 11); Melissa L. Nelken, *The Impact of Federal Rule 11 on Lawyers and Judges in the Northern District of California*, 74 JUDICATURE 147 (1990) (surveying judges and attorneys in the Northern District of California).

14. Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. PA. L. REV. 2179, 2182 (1989). Judge Carter stated:

> We will be justified in speaking of "substantive bias" in the contemporary application of procedural rules if we find that particular classes of substantive claims consistently receive less favorable treatment than others at the hands of those rules. . . . Chief among the rights encompassed under this heading [that is those claims receiving less favorable treatment] are those arising under the civil rights laws . . . .

Id. Later in the same article, Judge Carter uses data from one of the Rule 11 studies and critiques what he calls the "extraordinary substantive bias of Rule 11." *Id.* at 2192.

15. *See* Martin B. Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, and Rule 11 Sanctions Under the Federal Rules of Civil Procedure*, 67 N.C. L. REV. 1023, 1055 (1989). Louis concluded that there was insufficient evidence that civil rights attorneys and their clients were being unfairly targeted. *See id.* at 1062.

were more likely to be frivolous than other case types.[16]

Rule 11 was amended again in 1993. One motivation underlying the 1993 amendment was the desire to address some of the alleged problems that arose as a result of the effects of the 1983 version of Rule 11 upon civil rights cases.[17] It is possible, therefore, that the 1993 amendments resolved this controversy. Although we do not yet have studies to allow empirical comparisons,[18] it does appear that the critical rhetoric has died down.[19] Nevertheless, even if the new rule has ameliorated the impact of

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16. *See id.* at 1055 ("Even before the adoption of Rule 11, civil rights cases were regarded as a major source of meritless litigation and had already become the subject of increased intereception efforts. Thus, it was perhaps inevitable that plaintiffs asserting these and other disfavored or troubling claims would initially be the most visible targets of the new rule."). It was also argued that the assertions about the impact of Rule 11 upon civil rights cases were time bound. This rebuttal stated that, even if the complaints about Rule 11's impact upon civil rights litigation were true as to the first phase of Rule 11 activity, once the initial phase was past, the picture would be different. *See* Arthur R. Miller, *The New Certification Standard Under Rule 11*, 130 F.R.D. 479 n.45 (1990) ("Courts have shown a desirable sensitivity to this concern [chilling vigorous advocacy on behalf of civil rights plaintiffs] in a number of recent decisions.").

17. *See* Carl Tobias, *Reconsidering Rule 11*, 46 U. MIAMI L. REV. 855, 857 (1992) [hereinafter Tobias, *Reconsidering Rule 11*] (stating that difficulties with Rule 11's impact upon civil rights plaintiffs led to initiation of a study of the Rule with an eye to possible amendments). Although the Comments to the 1993 Amendment to Rule 11 do not mention civil rights cases, the Advisory Committee on the Civil Rules, in its consideration of whether to recommend amending the 1983 version of Rule 11, issued a call for written comments with 10 different questions. *See* Advisory Committee on the Civil Rules, Judicial Conference of the United States, *Call for Written Comments on Rule 11 of the Federal Rules of Civil Procedure and Related Rules*, 131 F.R.D. 334, 347 (1990). One of the questions was directed to ascertaining whether Rule 11 had been administered unfairly with regard to any group, particularly civil rights plaintiffs. *See id.* The Advisory Committee also issued the Interim Report on Rule 11 where it discussed the concern that Rule 11 had been applied disproportionately against civil rights plaintiffs. *See* INTERIM REPORT ON RULE 11 OF THE ADVISORY COMMITTEE ON CIVIL RULES, COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (1991), *reprinted in* VAIRO, RULE 11 SANCTIONS, *supra* note 10, app. I, at I-3 [hereinafter INTERIM REPORT]. Relying on the FJC Study, *see* FJC STUDY, *supra* note 13, the Interim Report first stated that the criticism regarding civil rights cases finds support in the data but then suggested that this disparity can be explained. *See* INTERIM REPORT, *supra* app. I, at I-3. For a discussion of some difficulties with the Federal Judicial Center's methodology, see *infra* notes 121-125 and accompanying text. This reliance on the Advisory Committee to support the statement in the text raises the question of whether one can attribute the Advisory Committee's motives to the Committee on Rules of Practice and Procedure (Standing Committee) which made the recommendation for the rules change. I believe it is plausible to do so for two reasons: (1) the ultimate rule change was close to the recommendation of the Advisory Committee and (2) the Advisory Committee developed the facts that provided the basis for the amendment.

18. There has been one empirical study, a survey of judges and lawyers conducted by the Federal Judicial Center. *See* JOHN SHAPARD ET AL., REPORT OF A SURVEY CONCERNING RULE 11, FEDERAL RULES OF CIVIL PROCEDURE (1995). This study, however, did not look at case data. *See id.*

19. One rough measure of the rhetoric is the activity in law reviews. The commentary on the 1983 version of Rule 11 was voluminous. There are over 100 articles (not including student notes and comments) listed in VAIRO, RULE 11 SANCTIONS, *supra* note 10, at app. F. By comparison, the number of articles, excluding student notes and comments, that I have found discussing the 1993 version has been less than 20. For discussions of the amended rule, see for example Jeffrey A. Pamess, *The New Federal Rule 11: Different Sanctions, Second Thoughts*, 83 ILL. B.J. 126 (1995); and Carl Tobias, *The 1993 Revision to Federal Rule 11*, 70 IND. L.J. 171 (1994).

Rule 11 upon civil rights cases, a careful look at the relevant studies and the debate about the relationship between the 1983 version of Rule 11 and civil rights claims will advance understanding of the controversy regarding neutral procedural rules.

In discussing this controversy, I argue that neutrality should be assessed by looking at the impact of a rule rather than by looking to the motive of the rulemakers. I further claim that if a rule has a differential impact we ought to consider the justifications for that differential impact before we conclude that the rule is non-neutral. Finally, I maintain that no discussion of neutrality is complete unless we consider the "baseline" from which we can measure deviations from neutral impact. There is a fundamental tension between the two parts of this article—its discussion of procedural neutrality and its discussion of Rule 11. Many claim that rules that have neutral impact are impossible.[20] Therefore, according to this point of view, the discussion in this article as to whether the 1983 version of Rule 11 is non-neutral is beside the point. However, the goal of this article is neither to prove nor disprove the proposition that neutrality is impossible. The projects I am pursuing seek to advance understanding of the ways we use the rhetoric of procedural neutrality and to force us to look closely at justifications for deviations from neutrality.[21] Rule 11 affords a case study for these projects.

I begin by defining more precisely what we might mean by procedural neutrality. In Section I of this article, I argue that one of the central meanings of procedural neutrality is closely related to the argument that procedural rules should be apolitical. In adopting this requirement for procedural rules, we expect those rules to treat different substantive claims equally. In Section II, I examine the studies of Rule 11 and consider what these studies reveal about the effect of the 1983 version of Rule 11 upon civil rights claims. I conclude that the studies support the proposition that civil rights claims were treated disproportionately by Rule 11. Therefore, Rule 11 did not meet the requirement that differing substantive claims be treated equally. These studies, however, do not conclusively prove that the 1983 version of Rule 11 violated the norm of procedural neutrality. Two other issues must be considered. First, some claim that finding improper motive on the part of the rulemakers is necessary before concluding that a

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20. *See* Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1472 (1987) (reviewing RICHARD L. MARCUS & EDWARD F. SHERMAN, COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE (1985)) ("It is true that procedural rules are never neutral in their effects . . . ."); E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 325 (1986) ("Ultimately, procedure and substance cannot be divorced: no procedural decision can be completely 'neutral' in the sense that it does not affect substance.").

21. I am not claiming, however, that neutrality is a necessary requirement for a valid or normatively good procedural rule. It is one of the attributes that should be considered, but it must be balanced against other objectives.

rule is not procedurally neutral. Second, others assert that there are neutral explanations for the results of the Rule 11 studies.

Therefore, in Section III, I consider whether a demonstration of improper motive is necessary for arguing that a rule is non-neutral. In this section, I consider a particular way of defining neutral rules—an approach closely linked to the debate over the appropriate rulemaking process. This perspective views neutral rules simply as rules that are neutral as written. It argues that to look at the rules in application politicizes the rulemaking process. This approach also argues that to show a violation of the norm of procedural neutrality, one has to prove improper motive. I reject that approach and in Section IV, I discuss the claim that even though the 1983 version of Rule 11 had a differential impact upon civil rights claims, it was nonetheless neutral because there was justification for its differential application. In particular, I consider whether the data showing that civil rights cases were disproportionately affected by Rule 11 can be justified by the argument that civil rights cases are more likely to be frivolous. My conclusion is that this "empirical" approach is inconclusive both because we lack sufficient data and because it requires us to make value judgments for which the data, even if sufficient on its own terms, cannot supply answers.[22]

In Section V, I take a different approach to the question of neutral rules by looking at some of the questions raised in the debates over "neutral constitutional principles." I argue that the question of neutrality presupposes a baseline from which we could measure deviations. Absent discussion about the baseline, any debate about neutrality simply misses one of the most central issues at stake. With regard to the relationship between the 1983 version of Rule 11 and civil rights claims, we need to first decide whether there was a serious issue regarding too many frivolous cases. Therefore, in determining whether a rule is non-neutral, we must not only go beyond motive to look for justifications for differential impact, but we also have to consider the status quo or baseline against which we measure deviations from equal impact. Only when we have undertaken this inquiry can we decide whether a rule is neutral or whether the deviations from neutrality are worth their alleged benefits.

I. PROCEDURAL NEUTRALITY

It is commonly assumed that in making substantive decisions it is appropriate for the legislature to make distinctions that favor one set of interests over another. The legislature, in making its choices, may choose to favor farmers over urban citizens. It may choose to pass a capital gains tax

22. *See* Robert Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficiency*, 87 GEO. L.J. 887, 915-16 (1999) [hereinafter Bone, *The Process of Making Process*] (discussing how empiricism cannot resolve most controversies over the legitimacy of procedural rulemaking).

that favors one type of income accumulation over another. These choices can be criticized on a number of grounds, such as whether they are wise, or whether they will accomplish the goals the legislature intended, but it is the stuff of politics to make such choices.[23]

Whether our courts should also make decisions based upon substantive preferences is a subject of endless debate, particularly within constitutional law.[24] Whatever one's views about the desirability or inevitability of courts making substantive choices, however, it is generally assumed that a court must use neutral procedures in making these choices to resolve any dispute before it.[25] But what exactly is meant by the concept of procedural neutrality is not as straightforward as it may appear initially.

The most basic attribute of procedural neutrality in the decision of a particular case is to have a decision maker who is not biased.[26] The decision maker should not decide the case by favoring the interests of one litigant over the other based on characteristics of the litigants that are unrelated to the substantive law.[27] Furthermore, the decision maker should decide the case with regard to the facts presented. A neutral decision maker should not have decided the case one way or the other beforehand,[28] nor should she rely on evidence outside of the record. Finally, the classic

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23. There are, of course, constitutional limits on the choices that the legislature may make but, short of any violation of those limits, the statement in the text is accurate.

24. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST, A THEORY OF JUDICIAL REVIEW (1980); Daniel R. Ortiz, *Pursuing a Perfect Politics: The Allure and Failure of Process Theory*, 77 VA. L. REV. 721 (1991); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980). Courts in their common, law making function make substantive choices, but these are justified because they are: (1) incremental and (2) subject to override by the legislature so that they are in the nature of provisional substantive choices. *See* GUIDO CALABRESI, COMMON LAW FOR THE AGE OF STATUTES 4 (1982).

25. It can be argued that the statement in the text collapses two different functions of courts: (1) courts as lawmakers (primarily appellate courts) and (2) courts as dispute resolvers (primarily trial courts). But besides the obvious point that it is not possible to completely separate the two functions, it appears to me that the textual statement is correct because we demand neutral procedures in proceedings that mainly involve dispute resolution and in proceedings that mainly involve law making. What may change is the content of the procedures.

26. *See* Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 851 (1984) (stating that "impartiality has long been valued as the *sine qua non* of judicial decision making"); *see also* Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 456-57 (1986) (arguing that the minimum content of procedural due process is having an independent adjudicator); Thomas D. Rowe, Jr., Background Paper, *Study on Paths to a "Better Way": Litigation, Alternatives, and Accommodation*, 1989 DUKE L.J. 824, 848 ("A non-controversial aspect of fairness in contested actions is, presumably, an impartial decision maker."). *But see* Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877, 1879-80 (1988) [hereinafter Resnik, *On the Bias*] (questioning whether the ideal of impartiality can be achieved in practice and whether, in light of feminist approaches, it is incomplete).

27. *Cf.* AVIAM SOIFER, LAW AND THE COMPANY WE KEEP 165-73 (1995) (discussing the problematic nature of neutrality in judging with regard to how much a judge can (or should) ignore her past associations as well as the group identities of the people to be judged).

28. *Cf.* Resnik, *On the Bias*, *supra* note 26, at 1885 (connecting ban on pre-judgment to "fear of unequal access to the person of the judge").

American conception of procedural neutrality stipulates that the decision maker should remain uninvolved in the development of the case before her because otherwise her neutrality might be compromised.[29]

It might be possible to conceive of neutral procedures where the only constraints are the ones stated above. However, we also expect a neutral decision maker to treat the parties before her equally. For example, it is commonly believed that each side should have the same opportunity to present its case.[30] This requirement, that parties have an equal opportunity to present their cases, can be considered a part of an overall fairness or equality requirement,[31] but it is also part of our conception of procedural neutrality. Neutrality expresses both a claim of impartiality and a claim of equality.[32]

Within our current system of dispute resolution, it is not sufficient that a decision maker alone fulfill the attributes of neutrality. We have procedural rules that apply across cases. Therefore, the rules that govern the process also ought to be neutral.[33] At one level, this simply means that the rules of procedure should be designed to protect the neutrality interests described above. For example, the rules should allow the removal of a decision maker who is biased.[34] The claim of neutrality is also expressed by the requirement that procedural rules should not discriminate in favor of particular kinds of litigants. Therefore the rules should not explicitly favor either the rich or poor.[35]

Designing rules to protect impartiality and to ensure equal treatment of different types of litigants may meet all the requirements of neutrality.[36]

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29. *See* FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE 4 (4th ed. 1992); Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159 (1958); *see also* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (describing and critiquing trend toward managerial judging). *But see* Robert Bone, *Lon Fuller's Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation*, 75 B.U. L. REV. 1273, 1309-10 (1995) [hereinafter Bone, *Lon Fuller's Theory*] (questioning the conventional view that Fuller believed in a judge being a passive umpire).

30. *See* Rowe, *supra* note 26, at 848.

31. *See* Robert S. Summers, *Evaluating and Improving Legal Processes—A Plea for Process Values*, 60 CORNELL L. REV. 1, 25 (1974).

32. *See* ANDREW GRAHAM ET AL., NEUTRALITY AND IMPARTIALITY: THE UNIVERSITY AND POLITICAL COMMITMENT 3, 5 (Alan Montefiore ed., 1975) ("[T]o be neutral is to help or hinder the various parties concerned in an equal degree."); *see also* John T. Valauri, *The Concept of Neutrality in Establishment Clause Doctrine*, 48 U. PITT. L. REV. 83 n.7 (1986) ("In addition, when one is neutral, one treats both parties equally, thus remaining impartial.").

33. *See* Mullenix, *Judicial Power*, *supra* note 1, at 755 ("[O]f what avail is neutral decision-making in the absence of neutral rulemaking?").

34. *See, e.g.*, John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237 (1987).

35. *See* SOIFER, *supra* note 27.

36. *See* JOHN RAWLS, THEORY OF JUSTICE 190 (1971). Neutral procedural rules should also provide an equal opportunity for access to the courts. The ability to have one's claims evaluated by a neutral decision maker is meaningless absent the ability to enter the legal system. Moreover, the ideal of neutrality implies that particular litigants or claims should not be deterred from access to the legal

When we look to the Federal Rules of Civil Procedure, however, we find that the rules are designed not only to ensure an impartial decision maker and the equal treatment of the litigants, but also to be impartial as to type of claim.[37] Perhaps this requirement of equal treatment of substantive claims is based on the proposition that impartiality includes the ideal of equality, but for both the framers of the Federal Rules and subsequent proceduralists there were other reasons why procedural rules should not differentiate between different types of claims.

One reason was that procedure should be simple and free from technicalities.[38] Cases should not be won or lost because of procedural error. They should be decided on the merits. Procedure should be "an unclogged artery through which substantive rights can flow."[39] To ensure simplicity, it was thought necessary to have uniform rules.[40] Moreover, the goals of non-technical procedure could be best achieved by having the same rules regardless of the type of case.[41] The horrors of the forms of action should not be replicated in modern procedure.

More significant for our purposes is the idea that neutral procedural rules should be apolitical. This perspective that neutral procedural rules should be apolitical was elaborated most creatively in the 1950s by the legal process theorists.[42] In an oft told story, the generation of post World

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system as compared to other litigants or claims unless the provision of an advantage (or disadvantage) to one litigant or type of claim is rationally dictated by external considerations. *See* Redish & Marshall, *supra* note 26, at 485 n.122. This leaves open the question of how much access to the legal system is appropriate for all claims. The preceding statement also avoids defining "access," a concept which has many definitional difficulties. *See* Austin Sarat, *The Litigation Explosion, Access to Justice, and Court Reform: Examining the Critical Assumptions*, 37 RUTGERS L. REV. 319, 322 (1985) (discussing some of the definitional problems).

37. *See* Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Transubstantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2079-81 (1989) [hereinafter Carrington, *Making Rules*].

38. *See* Edson R. Sunderland, *The New Federal Rules*, 45 W. VA. L.Q. 5, 30 (1938); *see also* Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 501 n.29 (1986) (stating that removing technicalities makes it easier to get to the merits of a case).

39. Janice Toran, *'Tis a Gift to Be Simple: Aesthetics and Procedural Reform*, 89 MICH. L. REV. 352, 376 (1990). Charles Clark explained that the rules were to be "but means to an end, means to the enforcement of substantive justice." Charles Clark, *Fundamental Changes Effected by the New Federal Rules (Pt. I)*, 15 TENN. L. REV. 551, 551 (1939); *see also* Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1910 (1989) (discussing uniformity as a tool for streamlining litigation and arriving promptly on the merits).

40. *See* Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2005 (1989).

41. *See id.* at 2006. It is not necessary for uniformity across judicial districts, however, but that rules be transubstantive.

42. It is not that legal process theory was the intellectual basis for the original federal rules adopting a transubstantive philosophy. That obviously cannot be the case given that the federal rules were adopted in 1938 and legal process theory flourished in the 1950s. Legal process theory, however, provided intellectual capital that helped sustain the transubstantive approach. Moreover, some of the ideas that animated the original proponents of the federal rules were strikingly similar to legal process

War II legal process scholars—Henry Hart, Lon Fuller, Albert Sacks, Herbert Wechsler and Alexander Bickel—developed their key idea of the centrality of process as a response to the legal realist critiques of formalism.

A major focus of the legal process school, particularly in the Hart and Sacks legal process materials,[43] was the development of ways to determine the appropriate institution for deciding particular legal questions. Central to this analysis was the evaluation of the relative competence of various institutions to resolve different types of problems.[44] However, the influence of legal process ideas was not limited to institutional analysis. The "proceduralism" of the legal process theorists also influenced mainstream views regarding the appropriate procedures for resolving disputes.[45] As Gary Peller has put it:

> Their intellectual strategy had two basic dimensions: first, they acknowledged the realist point that there was no neutral, determinate basis for deciding the social issues arising in cases; second, the fifties writers immediately domesticated this concession by limiting its application to the realm of "substance." At the level of "process," however, neutral, apolitical, reasoned . . . discourse was still possible . . . .[46]

Consistent with legal process theory, procedures for resolving disputes, therefore, could be regarded as neutral only if they were apolitical. For procedural rules to be apolitical, they should not differentiate on the basis of substance. If rules vary among competing substantive claims, they become political, and under this vision of neutrality, non-neutral.[47] Moreover, the apolitical nature of neutrality is critical because the idea of a neu-

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ideas. For a discussion of these ideas, see Bone, *The Process of Making Process*, *supra* note 22, at 894-97.

43. These materials, which were developed in the 1950s, were unpublished until 1994. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Phillip P. Frickey eds., Foundation Press 1994).

44. *See* William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 720 (1991); *see also* Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688, 695 (1989) (reviewing PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (3d ed. 1988)) (discussing how *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), can be viewed as a classic legal process case because it concerned itself with institutional questions).

45. *See* William N. Eskridge, Jr., *Metaprocedure*, 98 YALE L.J. 945, 963-65 (1989) (reviewing ROBERT M. COVER ET AL., PROCEDURE (1988)); *see also* Gary Peller, *Neutral Principles in the 1950's*, 21 U. MICH. J.L. REFORM 561, 568 (1988) (commenting that the legal process school resulted in leading law reviews of the late 1950s focusing upon procedural issues).

46. Peller, *supra* note 45, at 567.

47. *See* Carrington, *Making Rules*, *supra* note 37, at 2079; Erik K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341, 383-84 (1990); *see also* Kenneth W. Graham, Jr., *The Persistence of Progressive Proceduralism*, 61 TEX. L. REV. 929, 945 (1983) (book review) ("[L]ack of uniformity is a threat to the claim that procedure is a value free science.").

tral apolitical process is seen to give legitimacy to the substantive choices being made. As long as we get our process right, the substantive choices that result from that process are, by definition, presumptively legitimate.[48]

Returning, then, to the question at the start of this section—what do we mean by procedural neutrality—it appears that there are two core clusters of related ideas. One set of ideas stems from the classic image of justice blindfolded—cases should be decided without bias and without regard to the characteristics of the litigants. Moreover, each side must have an equal opportunity to present its case. The second cluster of ideas comes from equating neutrality with being apolitical. The particular form that this idea of neutrality takes in the Federal Rules of Civil Procedure is in having rules that are uniform as to type of case, i.e. rules that are transubstantive.

It can be argued, however, that this picture of procedural rules as being apolitical and transubstantive is inaccurate. First, it has always been the case that some substantive claims have been disfavored and treated differently under the relevant procedural rules.[49] Second, some argue that we not only have these obvious examples of differential treatment, but also that the rules have always been transubstantive in form only. According to these critics, the rules use broad, open-ended standards that in practice differentiate between claims based upon substance.[50] Finally, it is claimed that local federal court rules, the Civil Justice Reform Act, and the opt-out provisions of Federal Rule of Civil Procedure 26(a) have made the vision of transubstantive rules an anachronism. Regardless of whether we ever had a system of uniform rules, we do not have uniformity today.[51]

Whether these claims are accurate as an empirical matter can be debated. However, even if they have validity, the dominant normative vision of neutral rules of procedure remains one of rules that are apolitical and

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48. Hart and Sacks state: "[T]he central idea of law . . . [is] the *principle of institutional settlement*. . . .[T]he principle . . .expresses the judgment that decisions which are the duly arrived at result of duly established procedures of this kind ought to be accepted as binding upon the whole society." HART & SACKS, *supra* note 43, at 4. *But see* Bone, *Lone Fuller's Theory*, *supra* note 29, at 1293-94 (stating that this reading of the legal process school is overly simplistic and mistaken).

49. For example, fraud claims are treated differently in Rule 9. *See* FED. R. CIV. P. 9. A more recent example is the passage of securities reform legislation which requires stricter pleading rules in securities fraud cases and imposes other "procedural" limitations. *See* Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended at 15 U.S.C. §§ 77z-1, 77z-2, 78j-78u-4, 78u-5 (Supp. III 1998)).

50. *See* Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 715 (1988); Subrin, *supra* note 40, at 2006.

51. *See* Robel, *Fractured Procedure*, *supra* note 2 (discussing Civil Justice Reform Act); Robel, *Mandatory Disclosure*, *supra* note 4 (discussing uniformity and the mandatory disclosure rules); Subrin, *supra* note 40, at 2020 (discussing Local Rules); Carl Tobias, *Civil Justice Reform and the Balkanization of Civil Procedure*, 24 ARIZ. ST. L.J. 1393 (1992) (discussing Civil Justice Reform Act). *See generally* Erwin Chemerinsky & Barry Friedman, *The Fragmentation of Federal Rules*, 46 MERCER L. REV. 757 (1995) (discussing trend towards localism in rulemaking); Daniel J. Meador, *A Perspective of Change in the Litigation System*, 49 ALA. L. REV. 7, 11 (1997) (discussing erosion of a national set of rules).

transubstantive.[52] Although this cannot be proved in a rigorous sense, I, nevertheless, believe it is true. During hearings discussing revision of the 1983 version of Rule 11, both proponents and opponents of change espoused the view that civil rights lawyers should not be treated differently than other types of lawyers. For example, an opponent of changes to Rule 11 stated: "Some of what I have heard . . . this morning is a little disturbing, part of it is the concept or notion that there ought to be some sort of double standard depending upon the type of action brought, civil rights or any other."[53] On the other hand, a proponent of the proposition that Rule 11 needed amending because of its impact upon civil rights cases stated: "I don't feel [that] civil rights lawyers want to operate any differently than anybody else."[54] These statements illustrate that despite the politicization of rulemaking, the dominant ideology remains a vision of rules under which all claims are treated similarly.[55] Moreover, the claims about the lack of uniformity in the rules do not necessarily imply an abandonment of the transubstantive ideal. It is true that the two are closely related, but there can be non-uniform rules divided by attributes other than substance.[56] The primary motivation behind the current non-uniformity has been to develop ways to control perceived problems of overloaded dockets and rising costs; the goal has not been to promote rules that are non transubstantive.[57]

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52. This does not mean that the rules process has not become politicized. I am referring to normative aspirations or visions and not necessarily practices.

53. *Transcript of Public Hearing Before the Advisory Comm. on Civil Rules of the Comm. on Rules of Practice and Procedure*, at 80-81 (1991) [hereinafter *Committee on Rules Transcript*] (testimony of Michael Mack, American Insurance Association); *see also id.* at 63-64 (comments of Judge William O. Bertelsman) ("Why should the civil rights lawyer not have to do his homework like anyone else?"); *id.* at 78 (comments of Judge Winter) ("Your argument is along the lines that any imposition of Rule 11 sanctions is inconsistent with underlying civil rights statutes[;] you are claiming a special entitlement to civil rights lawyers that are not granted to others.").

54. *Id.* at 92 (testimony of Robert Mullen, Lawyers Committee for Civil Rights Under Law). For similar testimony of another proponent of change, see the testimony of Steven Tomashefsky, who stated: "I don't agree that there should be open invitations to people that need to prove less than other kinds of people do." *Id.* at 95.

55. The statement in the text can be objected to on the grounds that the lawyers testifying merely were using rhetoric that they thought would appeal to their audience. This may be true, we ask why their audience wanted to hear the rhetoric of substance-neutral rules. There are dissenters to the proposition in the text. *See* Jeffrey W. Stempel, *Halting Devolution or Bleak to the Future: Subrin's New-Old Procedure as a Possible Antidote to Dreyfuss's "Tolstoy Problem"*, 46 FLA. L. REV. 57, 84 (1994) (advocating experimentation with Subrin's approach); Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 27, 48 (1994) (advocating substance specific rules, but noting that the revised discovery rules implementing mandatory disclosure rejected this approach). Both Subrin and Stempel disagree with the premise that substance specific rules are necessarily less neutral.

56. *See* Stephen N. Subrin, *Uniformity in Procedural Rules and the Attributes of a Sound Procedural System: The Case for Presumptive Limits*, 49 ALA. L. REV. 79, 79-84 (1997) (discussing three types of uniformity: inter-federal district court uniformity, intrastate uniformity and transubstantive uniformity).

57. *See* Chemerinsky & Friedman, *supra* note 51, at 758 (attributing fragmentation to desire to do something about the litigation crisis rather than localism).

Indeed, it appears that we may be moving away from non-uniformity and back toward the ideal of uniform rules.[58]

I have argued that the dominant normative vision of neutral rules of procedure is still a regime of rules that are apolitical and transubstantive. In the next section, I shall examine the data from the Rule 11 studies to see if they support the claim that the 1983 version of the rule violated this vision of neutral rules. To preview what I conclude, the data will lend support to the claim the 1983 version of Rule 11 disproportionately affected civil rights claims, but will lead us to further discussion of what it means to say rules are neutral. In particular, the data raises the question of what evidence is needed to support a claim of non-neutrality. Is it enough to show that the rule in question has a differential impact upon a particular class of cases or claimants, or is some evidence of motive or intent to discriminate necessary to support a claim of non-neutrality?

II. THE RULE 11 STUDIES

The studies that provided empirical information about the impact of the 1983 version of Rule 11 made a significant contribution to the debate about the rule. Although none of the studies focused solely on civil rights litigation, a number of them offer evidence about the impact of Rule 11 upon civil rights claims. Two early studies looked at reported cases and concluded that civil rights cases appeared to be disproportionately affected by the 1983 version of Rule 11.[59] Although these studies have been frequently cited as support for this proposition,[60] the difficulty in drawing conclusions

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58. There is currently a proposed amendment to the 1993 amendment of Rule 26 which would restore uniformity by revoking the opt-out option. *See supra* note 3; *see also* Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 57-58 (1997) (arguing that the revision of Rule 83 of the Federal Rules of Civil Procedure was motivated by a push toward uniformity and to eliminate local rules, which are inconsistent with the Federal Rules). *But see* Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended at 15 U.S.C. §§ 77z-1, 77z-2, 78j-78u-4, 78u-5 (Supp. III 1998)) (treating securities fraud claims differently than other claims).

59. *See* Nelken, *supra* note 12; Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189 (1988) [hereinafter Vairo, *Rule 11: A Critical Analysis*].

60. The most prolific author in this regard has been Carl Tobias. He has written a number of articles discussing Rule 11 and its impact upon civil rights litigation. For example, in one of his articles, he states that:

> Recently assembled information derived from reported decisions shows that an inordinate number of sanctions has been sought in civil rights cases, that Rule 11 motions have been filed and granted against civil rights plaintiffs much more frequently than civil rights defendants, and that such plaintiffs have been sanctioned at a considerably higher rate than those who pursue any other type of federal civil litigation.

Tobias, *Rule 11 and Civil Rights Litigation*, *supra* note 12, at 490. He supports this claim by citing the Nelken article, Nelken, *supra* note 12, the Vairo article, *see* Vairo, *Rule 11: A Critical Analysis*, *supra* note 59, and the Third Circuit Study, *see* THIRD CIRCUIT REPORT, *supra* note 11. *See* Tobias, *Rule 11 and Civil Rights Litigation*, *supra* note 12, at 490 n.16. Tobias has relied upon the same sources in much of his other work. *See, e.g.*, Carl Tobias, *Civil Rights Plaintiffs and the Proposed Revision of Rule 11*, 77 IOWA L. REV. 1775, 1776-77 (1992); Carl Tobias, *Public Law Litigation and the Federal*

from these early studies is that they rely solely on reported cases.[61] The majority of Rule 11 cases are not reported in published opinions, even if we include within our definition of published opinions decisions available on Lexis or Westlaw.[62] We would have to assume that reported cases accurately reflect the universe of unreported cases (at least in the ways relevant to our inquiry) in order to be able to say with confidence that we have a true depiction of the relationship between Rule 11 civil rights cases and all other Rule 11 cases that have been decided during the relevant periods.[63] It appears, however, that civil rights cases generally have more of the characteristics that result in published opinions than do other kinds of cases such as those involving contracts or torts.[64] This might account for data showing a heavier concentration of reported civil rights Rule 11 cases. Therefore, the early studies of reported cases are suggestive, at best, about whether civil rights cases were disproportionately affected by Rule 11 activity.[65]

What reported cases depict is not irrelevant, however. Perhaps, published cases produce more of a signaling effect to the outside world than do unpublished cases. They may have more significance than unreported cases in affecting the behavior of the actors in the system, particularly on issues such as access.[66] To the extent that Rule 11 activity is at least par-

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Rules of Civil Procedure, 74 CORNELL L. REV. 270, 302-03 (1989); Carl Tobias, *Reassessing Rule 11 and Civil Rights Cases*, 33 HOW. L.J. 161, 162 n.6 (1990); Tobias, *Reconsidering Rule 11*, *supra* note 17, at 859; Carl Tobias, *Rule 11 Recalibrated in Civil Rights Cases*, 36 VILL. L. REV. 105, 106 n.5 (1991). Others have also relied upon these studies. For example, Arthur LaFrance, in an article written in 1988, relies upon professor Nelken's article in discussing Rule 11's impact upon public interest litigation. *See* LaFrance, *supra* note 12, at 334 n.8; *see also* Eric K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341, 363 & n.104 (1990) (citing Vairo and Nelken for proposition that "[e]arly Rule 11 research suggests that Rule 11 is being used disproportionately against plaintiffs, particularly in certain types of litigation such as civil rights cases") (internal quotations omitted).

61. *See* THIRD CIRCUIT REPORT, *supra* note 11, at 56-59.

62. The Third Circuit Study reports that only 9.1% of the Rule 11 cases that were disposed of resulted in opinions published in the reporter system and only 39.1% of the total dispositions were on Lexis or Westlaw. *See id.* at 59.

63. The Third Circuit Study found that sanctions were issued more frequently in published cases than in unpublished ones. *See id.* at 45.

64. A study by Siegelman and Donohue of employment discrimination cases is the most complete attempt to compare published and unpublished cases. *See* Peter Siegelman & John J. Donohue III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 L. & SOC'Y REV. 1133 (1990). They found that published employment discrimination cases differ significantly from unpublished cases. *See id.* at 1133. In particular, published cases tend to be more complex, more heavily concentrated in new areas of the law and to end in different outcomes. *See id.* at 1141 n.23.

65. The statements in the text are not meant as criticisms of the authors of these studies. Neither Nelken nor Vairo presented their studies as being definitive. Unfortunately, others have relied too heavily upon them. To that extent, those articles relying upon the two authors' studies tell us something about how law professors use data.

66. *Cf.* AJS Study, *supra* note 13, at 978-79 ("The absence of any clear relationship between the relative prevalence of Rule 11 activity in nonurban or metropolitan areas and attorneys' reactions

tially an ideological statement about worthiness of cases, published cases may have something significant to tell us, even if they only imperfectly reflect the universe of cases.

In order to obtain a complete picture of Rule 11 activity, however, one must go beyond the reported cases. I shall discuss four studies that have attempted to do that.[67] In discussing these four studies, I shall first briefly describe their methodologies. I will then look at the findings of the studies in two areas: sanctions requested and sanctions granted. Finally, I shall consider what overall conclusions we might draw—a discussion that will return us to a consideration of methodological issues and the appropriate definition of procedural neutrality.

Three of the four studies relied primarily on case data. A task force commissioned by the Court of Appeals for the Third Circuit in March 1987, conducted the first of these studies (Third Circuit Study).[68] The Task Force appointed Professor Stephen Burbank of the University of Pennsylvania Law School as its reporter and under his direction surveyed all Rule 11 activity in the Third Circuit during the period from July 1, 1987 through June 30, 1988. With the assistance of court clerks, the study examined both published and unpublished Rule 11 sanction decisions.[69]

The second study, conducted by the Federal Judicial Center, analyzed Rule 11 activity in five federal district courts where computerized information was available (FJC Study).[70] The time periods covered varied from district to district, ranging between 25½ months to 43 months. The earliest starting date was January 1, 1987 and the final dates were sometime in 1990, depending upon the district.[71] The FJC Study included more than 55,000 cases. Of these, 980 cases had some Rule 11 activity.[72]

Professor Gerald Hess conducted another study that focused on Rule

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suggests that a good degree of lawyerly reaction to Rule 11 is not tailored to the actual risks that lawyers face but is based more on general reaction to the rhetoric about the threats that the Rule creates.").

67. The four studies are the Third Circuit Study, *see* THIRD CIRCUIT REPORT *supra* note 11; the Federal Judicial Center Study, *see* FJC STUDY, *supra* note 13; the study conducted by Professor Hess, *see* Hess Study, *supra* note 13; and the American Judicature Study, *see* AJS Study, *supra* note 13.

68. *See* THIRD CIRCUIT REPORT, *supra* note 11, at 5.

69. *See id.* In addition, this study also surveyed lawyers who had been involved in Rule 11 activity, lawyers who practice in federal court, and judges. *See id.*

70. The districts selected were Arizona, District of Columbia, N.D. Georgia, E.D. Michigan, and W.D. Texas. *See* FJC STUDY, *supra* note 13, § 1B, at 1. The primary reason for selection of these districts was access to computerized data. *See id.* The study also surveyed federal district court judges about their experiences with Rule 11 and analyzed all district court and appellate opinions published between 1984 and 1989 that addressed Rule 11 issues. *See id.* at Overview and Acknowledgments.

71. *See id.* § 3A, at 1 (Ariz.); *id.* § 3B, at 1 (D.C.); *id.* § 3C, at 1 (N.D. Ga.); *id.* § 3D, at 1 (E.D. Mich.); and *id.* § 3E, at 1 (W.D. Tex.). The variability in time covered was a result of the differing record keeping practices of the districts. *See id.* § 1B, at 1.

72. These cumulative figures were derived by adding the results reported for each of the five districts. *See id.* § 3A, at 1-2 (Ariz.); *id.* § 3B, at 1-2 (D.C.); *id.* § 3C, at 1-2 (N.D. Ga.); *id.* § 3D, at 1-2 (E.D. Mich.); *id.* § 3E, at 1-2 (W.D. Tex.). There were actually 1336 Rule 11 motions or sua sponte orders because in some cases there was more than one such motion or order. *See id.*

11 litigation in Spokane County, Washington (Hess Study).[73] He examined court files in both federal and state courts.[74] Hess gathered data from cases filed in the United States District Court for the Eastern District of Washington from August 1, 1983 through December 31, 1990.[75] He examined the docket sheet for each civil case to identify cases with documents containing the terms "Sanctions," "Fees," "Attorney's Fees," "Terms," or "11."[76] The file for each identified case was then reviewed for information involving a Rule 11 order or a Rule 11 request in a motion or brief.[77]

A study conducted by the American Judicature Society employed a different methodology (AJS Study).[78] It did not look at case data directly. Rather, this study surveyed 4500 lawyers who practice in the federal courts of three different judicial circuits—the Fifth, Seventh, and Ninth—and drew its conclusions about case incidence from their responses.[79] As the authors of this study state, the virtue of this approach is that it allowed them to study both formal and informal Rule 11 activity.[80]

Three of the four studies found that the percentage of sanction requests in civil rights cases was disproportionately high relative to the number of civil rights cases in the total caseload. In the FJC Study, civil rights cases were targeted under Rule 11 more than twice as frequently as would be expected, based upon the number of civil rights cases filed. Civil rights cases were 9.75% of the 55,328 cases, but comprised 22.76% of the Rule 11 cases.[81] The Hess Study showed that "[n]on-prisoner civil rights plaintiffs have been the target of a disproportionately high degree of Rule 11 requests."[82] Civil rights cases brought by non-prisoners were the target of

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73. *See* Hess Study, *supra* note 13, at 316.

74. *See id.* I will not be discussing the state court data since my focus is on the impact of the federal rule.

75. *See id.* at 317.

76. *See id.*

77. *See id.* Professor Hess also surveyed lawyers and judges who preside or practice in Spokane County. *See id.*

78. *See* AJS Study, *supra* note 13, at 950.

79. *See id.* The study did not include all districts within each circuit, but did attempt to include within each circuit districts that included a metropolitan city, a mid-size urban community and a non-urban population. *See id.* This reliance upon the attorneys presents some difficulties in assessing the responses regarding incidence. The major issues are the reliability of the reports by the attorneys and the validity of the sample. On the question of the validity of the sample, the authors of the study state that "[t]he 75 per cent response rate from approximately 4500 attorneys surveyed gives us confidence that an accurate picture of Rule 11 activity inside and outside the courtroom was obtained." Herbert Kritzer et al., *Rule 11: Moving Beyond the Cosmic Anecdote*, 75 JUDICATURE 269, 270 (1992).

80. Formal activity was defined as those cases where either sanctions were imposed or there was a motion filed or an order to show cause issued by the judge. *See* AJS Study, *supra* note 13, at 951. Informal activity included those cases where there were threats or discussion about the possibility of Rule 11 being invoked, but where no motion was actually filed. *See id.*

81. *See* FJC STUDY, *supra* note 13 (deriving this figure from Tables 9 and 10 in Sections 3A through 3E).

82. Hess Study, *supra* note 13, at 340.

20% of all Rule 11 requests although they constituted only 5% of the civil cases filed.[83] The AJS Study also found that a disproportionate number of Rule 11 motions were filed in civil rights cases. Civil rights cases made up 11.4% of the federal cases filed, yet they constituted 18.7% of the cases in which Rule 11 motions were filed.[84] The exception to this pattern was the Third Circuit Study, which found that the relative percentage of sanction requests in civil rights cases to total sanction requests (18.2%) was only slightly higher than the relative percentage of civil rights cases to total civil filings in the Third Circuit (16%).[85]

If we look at sanctions granted, the studies use two different measures. Sometimes they discuss whether civil rights cases had a disproportionate number of sanctions relative to their numbers in the relevant caseload. Under this standard, for example, if civil rights cases were 10% of total caseload, the study considered them to be disproportionately involved in Rule 11 activity if they constituted more than 10% of all Rule 11 sanctions granted. At other times, however, the studies were more concerned with whether civil rights cases were being treated "worse" than other types of cases. Here the relevant measure was whether the percentage of sanctions granted in relation to sanction motions filed was higher in civil rights cases than in other case types. As I will discuss below, deciding which of these measures is most appropriate is critical to drawing conclusions from these studies.[86]

If we use the first measure of disproportionality—whether civil rights cases had a disproportionate number of sanctions relative to their numbers in the total caseload—we find that all four studies conclude that civil rights cases were disproportionately sanctioned, although sometimes for differing reasons. The Third Circuit Study's analysis of the imposition of sanctions showed that although civil rights cases were 16% of total civil filings, they

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83. *See id.*

84. *See* AJS Study, *supra* note 13, at 966 tbl.9. However, the ratio of motions filed to caseload was higher for "other commercial" cases than for civil rights cases. *See id.* "Other commercial" cases included general commercial litigation, antitrust, corporations law, banking law, insurance coverage, lender liability, securities, dealership and franchise, copyright, patents, and trademark cases. *See id.* They constituted 9.8% of cases filed but 23.1% of motions filed. *See id.* The study recognized the "grouping" problem in making this type of comparative analysis and also grouped cases by combining "other commercial" with "contracts." *See id.* at 967 tbl.10. Using this grouping, the civil rights cases stood out as the area where there was the greatest disparity between the percentage of Rule 11 motions filed and the percentage of cases to total caseload. *See id.* The AJS Study also looked at informal Rule 11 activity. *See id.* at 951. Civil rights cases constituted 17.4% of out of court references. *See id.* at 967 tbl.10. Again, however, the ratio of informal activity to percentage of caseload was higher for "other commercial" cases. *See id.* at 966 tbl.9. For a discussion of the significance of comparing case types, see *infra* notes 126-127 and accompanying text.

85. *See* THIRD CIRCUIT REPORT, *supra* note 11, at 69. Earlier the report did the same analysis by using requests plus sua sponte imposition of sanctions. *See id.* at 61. This slicing of the data gives a figure of 20.7% for civil rights activity versus 16% of total caseload. *See id.*

86. *See infra* notes 126-27 and accompanying text.

constituted 37% of the total number of cases where sanctions were imposed.[87] The results were comparable for the FJC Study, the Hess Study, and the AJS Study. For example, in the data reported by the FJC Study for the District of Arizona, although civil rights cases were 5% of total caseload,[88] sanctions against civil rights cases were 14% of total sanctions imposed.[89] This pattern was similar in other districts.[90] In the Hess Study, a significantly higher percentage of sanctions were granted against civil rights plaintiffs as a percentage of total sanctions granted than the percentage of civil rights cases relative to the total caseload.[91] In the AJS Study, civil rights cases made up 11.4% of the federal cases filed and 22.7% of the cases in which sanctions were imposed.[92]

It is important to note, however, that the reason for there being a higher percentage of sanctions against civil rights cases relative to the overall percentage of civil rights cases in the caseload was not consistent across the studies. In the Third Circuit Study, the reason seemed to be that judges granted a higher percentage of sanctions against civil rights cases than other case types.[93] In the FJC Study, the explanation was not that judges singled out civil rights cases, but rather the higher number of sanction requests against civil rights cases. For those who believe that finding bias is critical to concluding that the 1983 version of Rule 11 was not neutral, this distinction is crucial.[94]

If we switch our analysis to whether civil rights cases were sanctioned at a higher rate than other types of cases, we get different results. It is also necessary to deal with differences as to how this particular comparison was made. The AJS Study found that the ratio of sanctions to cases filed was about the same for civil rights and "other commercial cases."[95] No other study made this comparison. The Third Circuit, the Hess, and the FJC studies all looked at the percentage of sanctions imposed relative to the number of motions filed. In the Hess Study, sanction rates measured in this way were similar in non-prisoner civil rights cases to the rate in other

87. This is a derived figure. It is not discussed in the report. However, the data reported in Appendix A, Part V shows that there were 27 sanctions imposed and that 10 of these were in civil rights cases (eight on motion and two sua sponte). *See* THIRD CIRCUIT REPORT, *supra* note 11, at 110-11.

88. *See* FJC STUDY, *supra* note 13, § 3A, at 12 tbl.9.

89. *See id.* § 3A, at 15 tbls.9 & 12.

90. *See id.* The numbers were 11% for total filings and 23% for sanctions in the District of the District of Columbia, *see id.* § 3B, at 11 tbl.9, 14 tbl.12; 12% for total filings and 45% for sanctions in the Northern District of Georgia, *see id.* § 3C, at 13 tbl.9, 16 tbl.12; 9% for total filings and 29% for sanctions in the Eastern District of Michigan, *see id.* § 3D, at 13 tbl.9, 17 tbl.12; 11% for total filings and 27% for sanctions in the Western District of Texas, *see id.* § 3E, at 13 tbl.9, 17 tbl.12.

91. *See* Hess Study, *supra* note 13, at 340 chart 26.

92. *See* AJS Study, *supra* note 13, at 966.

93. *See* THIRD CIRCUIT REPORT, *supra* note 11, at 69.

94. *See infra* notes 126-27 and accompanying text.

95. AJS Study, *supra* note 13, at 966-67.

cases.[96] In the FJS Study, the number of civil rights cases sanctioned as compared to the number of sanction orders issued was higher than in any other case type in the three of the five districts studied.[97] In two of the districts, the imposition rate was higher for torts cases.[98] The Third Circuit Study found that plaintiffs in civil rights cases were sanctioned at a higher rate than plaintiffs in all non-civil rights cases.[99] Unfortunately, the data in this study referring to non civil rights cases is not categorized in narrower case groupings. Therefore, it is not possible to compare its results to other studies directly.

To summarize, if we use as our measure of disproportionality whether the percentage of civil rights cases sanctioned is greater than the percentage of civil rights cases in the caseload, we find that, except for the Third Circuit Study, the number of Rule 11 motions filed against civil rights cases was disproportionate to the total number of civil rights cases. The number of sanctions granted was disproportionate to the overall number of civil rights cases in the caseload in all of the studies. However, if we use as our measure of disproportionality whether civil rights cases were treated worse than all other case types, we derive a different conclusion. The data shows that civil rights cases were not always treated worse than all other case types.

Judicial districts in all parts of the country, including rural, mid-size urban, and urban districts were part of the four studies. This wide variety of locations suggests that the overall results reflect the country as a whole. Yet one cannot move from this conclusion to the conclusion that location is not a relevant variable. First, although the aggregate totals in each of the studies may reflect the country as a whole because of the variety of districts covered, there were variations at the district level which may have been masked by the aggregate data. The AJS Study in particular looked at the type of district as a variable and concluded that there was a "rather substantial, statistically significant difference in the level of Rule 11 activity in predominantly non-urban and mid-size urban districts as compared with met-

96. *See* Hess Study, *supra* note 13, at 340.

97. *See* FJC STUDY, *supra* note 13, § 1B, at 17-19.

98. *See id.* The study chose to compare the number of orders imposing sanctions relative to the total number of orders issued in Rule 11 cases rather than Rule 11 motions filed because some of the motions were pending at the time of the study. *See id.*; *see also id.* §§ 3A to 3E, tbl.12 (showing the percentage of orders/motions pending in each district polled). The study also asked: "[i]n which natures of suit were the orders imposing sanctions concentrated?" *Id.* § 1B, at 18. However, this analysis is not very meaningful because it does not account for differences in volume of cases. It would not be surprising for there to be more sanctions in torts than civil rights if the number of tort cases is twice that of civil rights.

99. *See* THIRD CIRCUIT REPORT, *supra* note 11, at 69 (showing plaintiffs and/or their counsel sanctioned in civil rights and employment discrimination cases in 47.1% of the cases where sanctions were requested as compared to a sanction rate of 8.45% for plaintiffs in non-civil rights cases).

ropolitan areas."[100] Second, drawing conclusions about location raises the question of whether the Third Circuit's variation in the incidence of civil rights motions, as compared with the other studies, can be explained by the place of the study.

The Third Circuit Study reported that judicial opinions within the Third Circuit had been less aggressive in imposing sanctions than in some other circuits.[101] Does this lead to the difference in the data regarding the percentage of motions filed against civil rights cases? By itself, the answer seems to be no. Even if this less aggressive posture were an explanation for why the Third Circuit had fewer Rule 11 motions—a conclusion we cannot draw[102]—we still cannot assume that it explains the disparity in the incidence of Rule 11 motions in civil rights cases relative to their numbers in total caseload. An explanation for the decrease in number of motions does not explain the variation in the relative percentages by case type unless there is some reason to believe that the explanation affects the various case types differently. One possibility that does look to the differential treatment of case types might be variation in pleading rules. The Third Circuit was considered to be one of the leaders in requiring civil rights cases to conform to strict pleading rules.[103] Perhaps civil rights lawyers practicing in the Third Circuit were "educated" to follow this stricter pleading requirement and this made filing Rule 11 sanction requests against civil rights cases in the Third Circuit harder. This explanation, however, is pure conjecture.[104] Ultimately, we have to accept that there is

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100. AJS Study, *supra* note 13, at 978. Metropolitan districts had a higher level of Rule 11 activity in each of the four categories studied: sanctions, motions, in-court references, and out-of-court references. *See id.* However, the AJS Study further found that lawyers' responses to the threat of Rule 11 sanctions were not related to the size of the district. *See id.* at 977. The study also concluded that "reaction to Rule 11 is not tailored to the actual risks that lawyers face but is based more on general reaction to the rhetoric about the threats the Rule creates." *Id.* at 979. These findings about the lack of a direct relationship between actual Rule 11 activity and lawyers' responses carried over at the circuit level. *See id.* at 981. The Seventh Circuit had the highest level of sanctions but the Fifth Circuit had the highest level of behavioral response by lawyers. *See id.*

101. *See* THIRD CIRCUIT REPORT, *supra* note 11, at 25, 62; *see also* AJS Study, *supra* note 13, at 981 ("The Seventh Circuit, for example, has the reputation of being the most aggressive enforcer of Rule 11 . . . .").

102. *See* AJS Study, *supra* note 13, at 979 (concluding that lawyers' responses to the threat of Rule 11 sanctions are not necessarily related to the actual threat). *But see* Herbert M. Kritzer & Frances K. Zemans, *Local Legal Culture and the Control of Litigation*, 27 L. & SOC'Y REV. 535, 545 (1993) (suggesting that the tone of opinions might affect lawyers' behavior).

103. *See* Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 449 (1986).

104. A possible explanation for variation in motions in general is "local legal culture." Kritzer & Zemans, *supra* note 102, at 535. The authors of the AJS Study looked to a variable they defined as "local legal culture" to try to determine whether the variation among districts could be explained by this variable. *Id.* They concluded that "local legal culture" had no explanatory power except possibly as a partial explanation of motions filed. *See id.* at 547. Of course, in addition to the tentativeness of their finding, we also have the problem of figuring out what is different about the Third Circuit which could meaningfully be considered "local legal culture" and how that culture would affect civil rights motions.

variation among districts and circuits, but that certain patterns nonetheless persist when we consider the country is considered as a whole.

Besides the concern about the variance in results from the Third Circuit Study, a methodological problem that applies to all of the studies must be addressed. Critics of the Rule 11 studies have claimed that the label "civil rights" is not meaningful. Judge Winter, for example, in discussing the Rule 11 studies during the hearings on amending the 1983 version of Rule 11 stated: "[W]hen the term civil rights is used one normally thinks of racial discrimination, gender discrimination, police brutality and things like that. The category civil rights used in all these cases extends way beyond that."[105] From this perspective, the important question is whether Rule 11 has adversely affected "true" civil rights cases. According to these critics, because the data in the four studies present civil rights cases as an undifferentiated category, they overstate the problem of Rule 11's impact.[106] Judge Winter is correct when he states that the category "civil rights" extends beyond what might be considered traditional civil rights cases.[107] Civil rights cases can range from brutality claims against police officers to claims that municipalities have violated due process in the manner in which rates have been set for water. However, even if one accepts a dichotomy between "true" and "false" civil rights cases, the issue of whether the data used in the studies overstates the problem depends upon the degree of Rule 11 activity in "false" civil rights cases versus the degree of Rule 11 activity in "true" civil rights cases.[108] Furthermore, it is not apparent that it is possible to agree upon an acceptable dividing line. Past attempts to divide "true" civil rights cases from "spurious" ones have not been success-

105. *Committee on Rules Transcript*, *supra* note 53, at 55 (testimony of Judge Winter); *see also id.* at 146 (comments of Professor Maurice Rosenberg).

106. *See* THIRD CIRCUIT REPORT, *supra* note 11, at 69-70 (acknowledging problem and noting that "'civil rights' is an elusive, or at least capacious, category, potentially embracing everything from a Title VII action alleging sex discrimination in a law firm to a § 1983 action alleging improper medical care in a state prison").

107. The Administrative Office collects its data regarding case types by using what is called the civil action cover sheet. These cover sheets are filled out by the plaintiff's attorney at the time of the filing of a case. They require the attorney to designate a case type (called nature-of-suit). The organization of the civil cover sheet includes major categories such as civil rights, contracts, torts, etc. and within each major category there are choices of nature-of-suit designations. It is the nature-of-suit categories that an attorney actually selects, and in the civil rights category there are five nature-of-suit choices: voting, employment, housing/accommodations, welfare, and other civil rights. In addition, there is a separate major category for cases brought by prisoners, which also has five nature-of-suit choices including one for civil rights actions. Relying on this classification scheme presents several advantages. It uses data that is readily available and cost effective. *See* Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 653 (1987) ("To eliminate categorization errors and ensure the most complete set of civil rights cases, one would examine every civil complaint filed and check every case that the Administrative Office coded as a civil rights or prisoner case. Budget and time constraints preclude such a procedure. Instead, the study relies on the Administrative Office lists to identify civil rights cases.").

108. We have no data on this issue.

ful. At one time, the basic civil rights statute, 42 U.S.C. § 1983, and its jurisdictional counterpart, 28 U.S.C. § 1343, were limited to personal civil rights but not property rights.[109] For example, in *Hague v. Committee for Industrial Organization*,[110] Justice Stone read § 1343 to encompass 'personal,' but not 'property,' rights.[111] This distinction was overruled several decades later in *Lynch v. Household Finance Corp.*[112] in which the Court held that procedural due process protected property rights within the jurisdiction of § 1343.[113] I suspect that both those on the left and the right would agree, albeit for different reasons, that claims that protect "property" interests can indeed be civil rights issues.[114]

Perhaps the most important point made by critics, such as Judge Winter, may be that each one of us has our own images of civil rights cases. These images may not conform to the categorization used in these studies or to the rhetorical images evoked by critics of the 1983 version of Rule 11. It would be extremely useful to have more contextual data. Such data would help us better understand the relationship between Rule 11 and civil rights claims and also help us evaluate whether that relationship really was problematic. The absence of such data does not make these studies irrelevant, however, though it may make the problems of interpretation more difficult.

Focusing on all civil rights cases may also create a problem because of the presence of pro se cases. There has also been some concern expressed about including sanctions against defendants.[115] In varying ways, the studies tried to account for these problems. By and large, the data tells the

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109. *See generally* Michael G. Collins, *"Economic Rights," Implied Constitutional Actions, and the Scope of Section 1983*, 77 GEO. L.J. 1493 (1989) (discussing the historical and proposed future scope of § 1983).

110. 307 U.S. 496 (1939).

111. Collins argues that at one time the Supreme Court distinguished civil rights from political rights. *See* Collins, *supra* note 109, at 1501. "Political rights were rights to participate in government, the most notable of which were rights to hold state office and to vote." *Id.* (quoting *Ex parte* Virginia, 100 U.S. 339, 368 (1879)). Civil rights, were "personal" and judicially enforceable. *See id.* Political rights were "conditional" and "dependent on the discretion of the elective or appointing power." *Id.*

112. 405 U.S. 538 (1972).

113. *See id.*

114. *See, e.g.*, Frank H. Easterbrook, *Implicit and Explicit Rights of Association*, 10 HARV. J.L. & PUB. POL'Y 91, 98 (1987) (arguing that economic rights may be more important than associational rights, since those who lack control over resources are not in control of their destinies); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 49-53, 56-59 (1985) (advocating heightened scrutiny for distribution of resources to those exercising raw power to obtain governmental assistance and for instances when legislative process is not deliberative).

115. Rule 11 civil rights cases against defendants might actually increase access to courts for civil rights claimants. Even if this were untrue, cases targeting defendants would seem unlikely to decrease access. A qualifier to this statement would be an argument that deterrence in this area is created by a perception that civil rights cases are likely to be the subject of Rule 11 activity and that civil rights plaintiffs lawyers will not distinguish between cases against plaintiffs versus cases against defendants in assessing the likelihood of being subject to Rule 11 sanctions.

same story even if one excludes pro se cases and prisoner cases.[116] It is also consistent if one focuses solely on plaintiffs.[117] The AJS Study surveyed lawyers regarding the impact that Rule 11 had on their practices.[118] The incidence of case specific responses among lawyers who specialize in a particular area appears to be uniform across categories of cases.[119] If plaintiffs' and defendants' lawyers are separated, however, "respondents who identified themselves as spending more than 50% of their time doing civil rights plaintiffs' work were far more likely to be affected by Rule 11 than other lawyers in virtually every response category that was measured."[120]

There is one exception to this pattern. The FJC Study reports different results by focusing solely on represented plaintiffs.[121] Its methodology, however, is flawed. The study attempts to answer the question of whether represented plaintiffs are being disproportionately targeted in civil rights cases relative to other case types by first deriving the number of Rule 11 motions filed against represented plaintiffs in each category of case.[122] Having obtained that figure, the FJC Study decided that the appropriate measure was to determine the percentage of the total Rule 11 activity within each case type directed at represented plaintiffs.[123] This led to the study's conclusion that the represented plaintiffs in civil rights cases were not being disproportionately targeted because the percentage of Rule 11 activity against them, compared to the total Rule 11 activity in civil rights cases, was actually lower than similar percentages for other major types of cases.[124] As the study acknowledged in a footnote, however, this may sim-

116. In the Hess Study, represented non-prisoner plaintiffs were the target of 14% of the Rule 11 requests against all non-prisoner plaintiffs. This exceeds the 5% of total caseload. *See* Hess Study, *supra* note 13, at 340 chart 26. However, the study does not tell us what percentage represented civil rights cases were of the total represented caseload. It seems plausible to assume that there are more pro se civil rights cases than pro se cases in other case categories. If this is true, then represented civil rights cases would be less than 5% of the total represented caseload and the disparity would be greater. *See id.* If we look only to sanctions, the study reports that civil rights cases constituted 11% of the sanctions against represented non-prisoner plaintiffs and 5% of the caseload. *See id*; *see also* THIRD CIRCUIT REPORT, *supra* note 11, at 71 (noting that the disparity in sanctions issued persisted even after uncounseled pro se plaintiffs were excluded while "counselled [*sic*] civil rights plaintiffs . . . were sanctioned on motion at a rate (5/11 or 45.5%) far higher than the rate for counselled [*sic*] plaintiffs in non-civil rights cases (6/69 or 8.7%)").

117. *See* Hess Study, *supra* note 13 (reporting that the study's results focused solely on plaintiffs).

118. *See* AJS Study, *supra* note 13, at 970-75.

119. *See id.* at 972 tbl.13.

120. *Id.* at 971.

121. *See* FJC STUDY, *supra* note 13, § 3A, at 14; § 3B, at 13; § 3C, at 15; § 3D, at 15-16; § 3E, at 16.

122. *See id.*

123. *See id.*

124. *See id.* This was true of four of the five districts studied. *See id.* The exception was the Western District of Texas. *See id.* § 1B, at 16-17; *see also* Elizabeth C. Wiggins et al., *Special Issue on Rule 11*, 2 FJC DIRECTIONS, Nov. 1991, at 2, 21-22 (stating that the occurrence of Rule 11 motions was greater in civil rights cases than in many other types of cases).

ply reflect differences in pro se activity across categories of cases.[125] Assuming there were more pro se activity in civil rights cases (not an implausible assumption), represented civil rights plaintiffs would be targeted less as a percentage of all civil rights sanctioning activity than similar comparisons for other case types because of the higher incidence of civil rights pro se activity. This comparison made by the FJC Study is also problematic because it ignores the effect of a higher incidence of Rule 11 motions filed against civil rights cases in general. As discussed earlier, another way to determine whether civil rights cases are being disproportionately affected is to compare motions or sanctions against parties in each case category relative to the total number of cases in that category. A similar analysis for represented parties would tell us for each represented case entering the court system how likely it is that a represented plaintiff in that case category would be involved in Rule 11 activity. Unfortunately, that calculation cannot be made because the data for number of represented cases by case type is not available. Absent that data, and absent additional justification for its methodology, the conclusions of the FJC Study regarding represented civil rights cases should be questioned.

Such issues do return us to a problem mentioned earlier: What is the significance of the different results obtained by the two principal ways of assessing disproportionality: (1) when comparing the number of civil rights Rule 11 cases as a percentage of total Rule 11 cases to the number of civil rights cases as a percentage of total case load and (2) when determining whether civil rights cases are being treated "worse" than the comparison case type? None of the studies discuss why one measure might be better than the other. The first method of defining disproportionality assumes that all cases have an equal likelihood of being affected by a particular procedural rule. If a particular type of case is out of proportion to its numbers in caseload, this may show a violation of the norm of procedural neutrality that rules should be apolitical and transubstantive.[126] The second method, comparing cases types, is more concerned with the reasons for such treatment. Comparing case types facilitates analysis of the reasons for the differential treatment. For example, finding that both civil rights cases and other commercial cases are being treated disproportionately relative to their numbers in the caseload might lead to the conclusion that the reason for the differential treatment has something to do with characteristics that are common to both types of cases. Knowing the specific reasons for the differential treatment might lead to the conclusion that the treatment is justified or that the reasons for such treatment are benign. This is a topic

125. *See* FJC Study, *supra* note 13, § 3A, at 14 n.20.

126. One of the Federal Judicial Center Project co-directors, Tom Willging, has criticized this type of comparison. *See infra* note 190. Willging argues that it is a simplistic comparison because some categories of cases such as contracts include many routine filings and default cases and therefore do not present comparable opportunities for sanctionable conduct. *See id.*

that we will return to in Section IV. Nevertheless, regardless of one's definition of discrimination, one cannot plausibly claim that there is no discrimination against one group or type of claim solely because another group was treated worse. We would not say there is no discrimination against Hispanics or Asian-Americans just because African-Americans are treated even worse.

There are those, however, who make a different claim. They contend that one has to find "bias" before one is justified in claiming that the norm of procedural neutrality has been violated. For those who contend that "bias" in decision-making is the relevant measure, looking at whether civil rights cases have been treated differently than other types of cases is critical because it is this differential treatment that will most help expose bias.[127] Furthermore, under this view, although data about disproportionate impact may be helpful in determining whether the rule has achieved its objectives, it does not prove lack of neutrality. One also has to show improper motive. This approach raises the question that is the subject of the next section: is evidence that the rulemakers had a discriminatory motive necessary to make a claim of lack of procedural neutrality? It is to this question that I now turn.

III. MOTIVE VERSUS IMPACT

Debates about whether proof of discrimination requires proof of an illicit motive are familiar in constitutional law. In procedure, the debate takes on a somewhat different character. Here the question of what counts as evidence of lack of neutrality is related to debates about the proper rulemaking process. Neutral procedural rules are those that are stated in sufficiently general terms that they are formally neutral. As long as a rule does not itself discriminate between particular claims or claimants and there is no evidence that the rulemaking process is biased against a particular group or claim, the rule has arguably met the requirements of neutrality.

The foremost proponents of this view have been Professors Paul Carrington and Linda Mullenix.[128] They have expressed concerns that looking

127. See Charles M. Yablon, *The Good, the Bad and the Frivolous Case: An Essay on Probability and Rule 11*, 44 UCLA L. REV. 65 (1996), where he analyzes the AJS Study's conclusions regarding sanctioning rates in civil rights cases and other commercial cases. Yablon concludes that factors common to both types of cases help explain the data and absolve judges of the charge of bias against civil rights claims. *See id.* at 90-91. Professor Yablon, however, is not one of those who is arguing that motive or bias are necessary before criticizing the impact of Rule 11. *See id.*; *accord* AJS Study, *supra* note 13, at 967 (making a similar comparison and drawing the same conclusion regarding bias).

128. *See, e.g.*, Carrington, *Making Rules*, *supra* note 37; Paul D. Carrington, *The New Order in Judicial Rulemaking*, 75 JUDICATURE 161 (1991) [hereinafter Carrington, *New Order*]; Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281 [hereinafter Carrington, *"Substance" and "Procedure"*]; Mullenix, *Counter-Reformation*, *supra* note 2; Linda S.

at data that demonstrates differential impact by type of claim politicizes the rulemaking process and, therefore, makes it more likely that rulemaking authority will be transferred to Congress. Professor Richard Marcus also advances these views in a somewhat different form.[129] He argues that by definition lack of neutrality requires motive.[130] To allow impact alone to show lack of neutrality would make all rules suspect because rules always have differential impact.[131]

Professor Carrington acknowledges that "[w]e are not likely to perfect neutrality in the rulemaking process or in the procedure [sic] rules themselves, any more than in other human institutions, and there should be no pretense that we have."[132] He also concedes that it is nonsense "to say that procedure is not political, just as it is nonsense to say that our courts are not political institutions."[133] Carrington, however, claims that there are "several reasons for continuing to pursue [the ideal of neutrality]."[134]

First, according to Carrington, a politicized rulemaking process makes the process less acceptable to litigants.[135] Second, as Mark Galanter has argued, it may be true that resource imbalances and other factors cause the "haves" to come out ahead.[136] However, the "have nots" would do even worse if procedural rules were viewed as having political content.[137] Therefore, Carrington argues that it is in the interests of the "have nots" to continue to act as if the ideal of neutrality were true both in the rulemaking process and in the content of rules.[138] Professor Carrington's primary reason for being concerned about political arguments regarding the rules, however, is that the traditional rulemaking process is superior to what would result if we viewed rules as political tools.[139] Politicizing the rules and the rulemaking process would mean more involvement by Congress and by special interest groups or, even worse, a change from reliance on a specialized body of experts to promulgate the rules to rules promulgated

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Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795 (1991) [hereinafter Mullenix, *Hope Over Experience*]; Mullenix, *Unconstitutional Rulemaking*, *supra* note 2.

129. *See* Marcus, *supra* note 4.

130. *See id.* at 771-76.

131. *See id.*

132. Carrington, *Making Rules*, *supra* note 37, at 2074.

133. Carrington, *New Order*, *supra* note 128, at 162. Carrington takes away some of the significance of his statement by arguing that the political values that rules implement are different than substantive values. *See id.*

134. Carrington, *Making Rules*, *supra* note 37, at 2074.

135. *See id.*

136. *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 123-25 (1974).

137. *See* Carrington, *Making Rules*, *supra* note 37, at 2074-75; *cf.* Hazard, *infra* note 161 (defending against transubstantive criticism of Federal Rules suggesting that the rules as they stand have widespread positive impact in achieving social justice).

138. *See* Carrington, *Making Rules*, *supra* note 37, at 2074.

139. *See* Carrington, *New Order*, *supra* note 128, at 162-66.

entirely by Congress.[140]

Carrington is not explicit about whether he would accept arguments about lack of neutrality based solely upon the effects of rules on different types of claims. The logic of his position, however, is that data showing one group or type of claim being affected more than another should not be used to prove lack of neutrality.[141] He states that a virtue of the present flexible rules are that they "reduce the level of political interest in procedural rules,"[142] and therefore help promote the "objective of political neutrality in rulemaking."[143] Reducing the political interest in rules also requires that we avoid arguments that the rules are not neutral based upon impact data, because such claims would cause organized groups to politicize the rulemaking process.[144]

Professor Mullenix, who shares many of Professor Carrington's concerns, is more explicit. She criticizes public interest partisans for assuming that there are no such things as facially neutral rules.[145] She argues that public interest partisans jeopardize the Advisory Committee's work by inaccurately ascribing political content to proposed rules.[146] According to Mullenix, empirical research regarding general procedure questions, such as why lawyers do or do not comply with discovery rules or why some lawyers act professionally and others do not, would be interesting. Empirical studies based on types of litigation and types of litigants, however, are dangerous because they might infuse the rulemaking process with partisan agendas.[147] These studies are not necessary, in her view, because they do not prove that the rules are not neutral. Neutral rules are those promulgated by an apolitical process which adhere to the core principles of "transsubstantiality, generality and flexibility."[148]

Such arguments that do not allow data about the impact of procedural rules to show lack of neutrality rely on a number of empirical claims. The major claim is that a legislative rulemaking process will be worse than the

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140. *See id.* at 165-66. It has been argued by Professor Mullenix that we have already moved too far in this direction of politicizing the rulemaking process to everyone's detriment. *See* Mullenix, *Hope Over Experience*, *supra* note 128.

141. Others have read Professor Carrington's writings to state this view and I believe this is a fair interpretation. *See* Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1936 (1989).

142. Carrington, *Making Rules*, *supra* note 37, at 2085.

143. *Id.*; *see also* Mullenix, *Hope Over Experience*, *supra* note 128, at 801-02 (agreeing with virtues of the current rule system by warning of the negative consequences of change).

144. *See* Stephen B. Burbank, Comment, *Hold the Corks: A Comment on Paul Carrington's "Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 1012, 1042-43.

145. *See* Mullenix, *Hope Over Experience*, *supra* note 128, at 823.

146. *See id.* at 824.

147. *See id.* at 829-30.

148. *Id.* at 841. Mullenix attributes these views to what she calls the traditionalists, but I believe a fair reading of her article is that she allies herself with those views, but wonders whether they can survive in an increasingly politicized environment. *See id.*

present process of using committees composed of judges, academics and practicing lawyers.[149] More importantly, the argument assumes that the inevitable result of allowing the impact data to be used in assessing whether a rule is neutral would be that the rulemaking process will become politicized and will therefore be turned over to Congress.[150] This may be true, but there are examples, such as the base closing commission, where Congress has deferred to "expert" bodies to make "political" decisions.[151] The use of administrative agencies to avoid political decisions is a common occurrence.[152] Indeed, in some situations, the fact that an issue becomes politicized may be a reason why Congress chooses to avoid the issue. It is where Congress perceives political benefits from resolving an issue that is more likely to intervene.[153] Therefore, politicization may be a necessary

149. *Id.* at 841-42. This argument assumes that experts are better than politicians at making the rules and that immunity from political pressures will lead to better rules. *See also* Bone, *The Process of Making Process*, *supra* note 22, at 918-47 (arguing that court based rulemaking is superior because it is more likely to create rules that fulfill the goals of efficiency, protecting rights, and implementing process values.)

150. *See* Mullenix, *Hope Over Experience*, *supra* note 128, at 801-02.

151. *See* Defense Authorization Amendments and Base Closure and Realignment Act of 1988, Pub. L. No. 100-526, 102 Stat. 2623 (codified as amended at 10 U.S.C. § 2687 (1994 & Supp. IV 1999)); *see also* Natalie Hanlon, *Military Base Closings: A Study of Government by Commission*, 62 U. COLO. L. REV. 331, 336-40 (1991) (discussing the 1988 Act and its ramifications). Hanlon also discusses the use of commissions to address Social Security reform, *see id.* at 340-42, Congressional pay raises, *see id.* at 342, and solving the deficit problems of the 1980s, *see id.* at 344-45. In addition to the use of commissions, Congress has delegated to private parties the ability to set rules. *See generally* Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62 (1990).

152. *See generally* THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES 92-126 (2d ed. 1979) (discussing liberal ideology and the delegation of power to administrators); DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 3 (1993) ("Congress and the president now delegate lawmaking power wholesale."). Critics of Lowi and Schoenbrod do not disagree about whether delegation has occurred, but instead about to what extent the courts should police the delegation through the use of the non-delegation doctrine. *See, e.g.*, Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391, 329 (1987); Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775, 776-77 (1999); Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323, 327 (1987).

153. *See* Hanlon, *supra* note 151, at 331 (discussing use of commissions as a response to Congress avoiding direct responsibility for "politically risky issues" that have "little political mileage to be gained by an affirmative decision in the matter"); SCHOENBROD, *supra* note 152, at 93 (arguing that "legislators . . . use delegation to maximize their credit and minimize their blame"); *cf.* David Epstein & Sharyn O'Hallaran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947, 950 (1999) (asserting that Congress delegates in those areas where the legislative process produces inefficient outcomes); William A. Niskanen, *Legislative Implications of Reasserting Congressional Authority Over Regulations*, 20 CARDOZO L. REV. 939, 941-42 (1999) ("Congress often approves very general regulatory legislation—leaving the regulatory agencies with broad discretion to define the law by the rules they promulgate. This permits members of Congress to play both sides of the street—to take credit for the presumed benefits of the regulation and to blame the agencies for the costs of meeting specific rules."). My argument in the text does not depend upon whole-hearted acceptance of the above positions or whole-hearted acceptance of "public choice theory," which provides some of the intellectual support for the above assertions. All that I am claim-

condition for congressional involvement, but not sufficient by itself. When we look to the civil rules, if history is any guide, there are periods of Congressional interest in the rules followed by periods of Congressional disinterest.[154] In fact, the prime example of legislative interference in the Civil Rules in the 1990s—the Civil Justice Reform Act[155]—presents a mixed picture. Congress did mandate certain procedures and goals but, rather than drafting the rules itself, it delegated the drafting to lawyers and judges, albeit at the district court level.[156]

Perhaps, however, these arguments about the inevitability of legislative rulemaking if impact data are used rely less on an empirical prediction than on the idea that if we undermine the separation of politics from an allegedly apolitical rulemaking process, that process, by definition, has to be turned over to the political branches of government.[157] This reasoning is similar to the arguments made in the debate over whether a rule that has substantive impact transgresses the mandate of the Rules Enabling Act that federal rules shall not "abridge, enlarge or modify any substantive right."[158] If the mandate is viewed strictly, once the "substance" line is crossed, any

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ing is that self-interest enters into the calculus frequently enough that one cannot claim that the mere fact that an issue becomes politicized automatically means that Congress will assume control over the issue.

154. In the 1970s, the revision of the Federal Rules of Evidence became a "political" issue. There were fears then that Congress would assume control over the rulemaking process. *See* Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673, 675 (1975). This was also the last time before the current "rulemaking crisis" that there was significant debate in the academic literature about the appropriate rulemaking process. *See generally* Geoffrey C. Hazard, Jr., *Undemocratic Legislation*, 87 YALE L.J. 1284 (1978) (book review); Howard Lesnick, *The Federal Rule-Making Process: A Time for Re-Examination*, 61 A.B.A. J. 579 (1975); Jack B. Weinstein, *Reform of Federal Court Rulemaking Procedures*, 76 COLUM. L. REV. 905 (1976). In the 1980s, there was only sporadic Congressional interest in the rulemaking process. *See* Marcus, *supra* note 4, at 764-65. It is too early to tell whether the current congressional interest and politicization of the rulemaking process is part of a cycle or a permanent change. *But see* Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended at 15 U.S.C. §§ 77z-1, 77z-2, 78j-78u-4, 78u-5 (Supp. III 1998)); Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1187-90 (1996) (arguing that there has been increased congressional involvement in the rulemaking process since 1973). See Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655 (1995), for a history of recent Congressional activity and a description of the rulemaking process. The McCabe article describes recent Congressional intervention in the Federal Rules of Evidence. *See id.* Here, however, the interventions were in criminal law issues. *See id.* at 1684-85.

155. *See* Civil Justice Reform Act of 1990, Pub. L. No. 101-650, §§ 101-105, 104 Stat. 5089-98 (1990) (codified as amended at 28 U.S.C. §§ 471-482 (1994)).

156. *See id.*

157. *Cf.* Geyh, *supra* note 154, at 1191 ("If procedural rules are thought to modify substantive rights, and substantive rights are thought to be within the exclusive province of Congress to modify, no amount of access to the judicial rulemaking process is going to convince an interested party or her elected representative that Congress should not intercede.").

158. 28 U.S.C. § 2072(b) (1994). One critical difference is that arguments about the Rules Enabling Act are also arguments about Congressional intent. For a discussion of the intent of the original drafters, see Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

rulemaking outside of Congress is illegitimate. However, as most first year procedure courses attempt to teach, the reality is that many procedural decisions tend to be both substantive and procedural. Therefore, any steadfast label one way or the other will prove illusory.[159] Hence, the decision as to what rulemaking process to follow cannot be made simply on the basis of categorizing a rule as "procedure" or "substance," or as "apolitical" or "political." Rather, the debate should be about what is a better rulemaking process.[160] Impact data is relevant to this determination of what rulemaking process to utilize but, by itself, does not compel use of a legislative process.

The arguments against considering the effects of rules on particular groups or claims also warn that the rulemaking process that would result might be less advantageous to the politically powerless. Professors Carrington and Mullenix may be correct, but they offer no evidence to support their position.[161] The strongest argument in favor of the proposition that evidence about impact will be harmful to weaker groups is that the effect of arguing about impact will convert the rulemaking process into a form of interest group politics and then, almost by definition, weaker groups will lose more often than they win.[162] Certainly, this is a plausible argument. Yet in Carrington's version of this argument there is an important intermediate step. He assumes the powerless will lose not because stronger organized groups will have greater impact upon the current rulemaking process but because the infusion of politics will change the rulemaking process from one of rules made by judges to legislative rulemaking, a forum where organized groups will have more influence.[163]

The inevitability of the change to a legislative rulemaking process is

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159. The classic article making this point is Walter Wheeler Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333 (1933).

160. Thus, it is possible to argue that the endless debate over the appropriate dividing lines are rhetorical strategies rather than reasons. As Professor Mullenix states: "As a practical matter, the only interesting debate is whether legislated procedural rules are in any sense better than judicially promulgated ones." Mullenix, *Hope Over Experience*, *supra* note 128, at 843. See Bone, *The Process of Making Process*, *supra* note 22, for an analysis of criteria that might be used to decide which rulemaking process is better. Consistent with the text above, Professor Bone rejects the idea that because procedure or a procedural rule has substantive effects, it necessarily means that we have to use a legislative process. *See id.* at 948-50.

161. Professor Hazard has argued that the experience under the Federal Rules has been to open up access for "have nots." *See* Geoffrey C. Hazard, Jr., *Discovery Vices and Transubstantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2246-47 (1989). He further argues, that if the rules had been tailored to focus on particular claims or grievances, it is unlikely that they would have been as useful for groups espousing social justice because it would have been unlikely that rules favoring those claims would have been adopted. *See id.* He may be right, but his position is basically conjecture. As he also states, it is unlikely that in 1938 we would have anticipated the kinds of civil rights and environmental litigation that arose beginning in the 1960s. *See id.* at 2246. Therefore, it is hard to imagine the kinds of arguments that would have occurred.

162. *See* Marcus, *supra* note 4, at 774.

163. *See* Carrington, *"Substance" and "Procedure"*, *supra* note 128, at 301.

open to debate, as suggested above. Moreover, Carrington and Mullenix assume that weaker groups will always do worse in the realm of politics than in the realm of "neutral" procedural argument. As Judith Resnik has argued, however, repeat players such as insurance companies have used the rhetoric of allegedly neutral principles, such as claims about overloaded courts, to reform the rules to their advantage.[164] It seems at least equally plausible that to ignore the effects of procedural rules and to continue to believe that procedure is apolitical may only increase the power of repeat players who make their arguments in apolitical terms.

Even if these empirical arguments about the undesirability of a switch to a legislative rulemaking process or the effects of political arguments on the less powerful are true, that does not render impact data irrelevant to a showing of a lack of neutrality. These arguments confuse what is desirable with what is. The arguments about politicizing the rulemaking process by Professors Carrington and Mullenix may be powerful warnings to partisans of the less powerful about the dangers of using a particular type of rhetoric. Such arguments also may be viewed as prudential suggestions to the rulemakers themselves to adopt a particular mind-set while writing the rules.[165] To support the claim that impact data are not sufficient to show lack of neutrality, however, additional argument is necessary. Professor Marcus attempts to provide such an argument.

Professor Marcus agrees with Carrington and Mullenix that we "should continue to endorse the pursuit of a neutralist rulemaking process."[166] Moreover, he also agrees that if the rulemaking process is politicized the powerless will be the losers. He also shares their belief that the source of rules is significant in maintaining neutrality. He goes beyond their arguments, however, when he makes an effort to define neutrality with more precision. For Professor Marcus the key issue is motive.[167]

Neutrality in the rulemaking process, according to Professor Marcus, is possible only when the promulgation of rules is not driven by self interest.[168] Procedural rules are neutral if they are honest attempts to "accom-

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164. *See* Judith Resnik, *The Domain of Courts*, 137 U. PA. L. REV. 2219, 2226-27 (1989); *see also* Stephen Daniels, *The Question of Jury Competence and the Politics of Civil Justice Reform: Symbols, Rhetoric and Agenda-Building*, 52 LAW & CONTEMP. PROBS. 269 (1989) (analyzing the merits of contemporary criticism of civil jury excesses). *But see* Mullenix, *Hope Over Experience*, *supra* note 128, at 856 (arguing that the representatives of the "have nots" are the ones who have politicized the process).

165. Compare the arguments made by Scott Altman in his article on judicial candor. *See* Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296 (1990). Altman argues that certain beliefs can be partially self-fulfilling. *See id.* at 303-04. Therefore, it is better that judges believe that law or rules constrain their decision-making, even if this is not true, because they will act in a more constrained manner than their colleagues who might hold more accurate beliefs about the judicial decision-making process. *See id.*

166. Marcus, *supra* note 4, at 762.

167. *See id.* at 773.

168. *See id.*

modate the [procedural] concerns of accuracy, participation, and efficiency."[169] This approach allows for the possibility that there may be an uneven impact as a result of certain rule reforms, even if that impact is not the principal objective of the rulemakers.[170] Moreover, Marcus' approach allows the rulemakers to make "procedural" value choices but not substantive ones. In this way, Professor Marcus connects his conception of neutrality directly to the tradition that views procedural values as neutral and apolitical.

Professor Marcus' conception of neutrality is also linked to two other traditions. First, in defining neutrality as a decision not driven by self interest, Marcus' claim is similar to the impartiality requirements that we place upon judges in individual cases.[171] In addition, Marcus' idea of motive as the decisive factor is similar to the test used in current interpretations of constitutional law where proof of motive is required to show a violation of the equal protection clause.[172] It is, therefore, fair to say that Professor Marcus' conception of neutrality is one possible way to define neutrality.[173] The question remains whether Marcus' insistence on the importance of motive is the best description of neutral procedural rules.

In focusing on motive, Professor Marcus ignores significant differences between individual decision-making by judges and rules that structure litigation. If we say that lack of neutrality requires motive with regard to an attack upon a decision made by an individual judge, we may do so for several reasons. First, the issue of whether a judge is biased or non-neutral most frequently arises in the form of a motion to disqualify. This occurs usually before the judge has made a decision. Therefore, we tend to rely on the presence of "certain powerful motives" to predict judicial behavior during litigation.[174] The timing of motions to disqualify creates the need for proxies to determine lack of neutrality.[175] A judgment about the neutrality of rules made after the fact does not have to rely on proxies.

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169. *Id.* at 774.

170. *See id.* at 776.

171. *See, e.g.*, Leubsdorf, *supra* note 34, at 240.

172. In 1976, the Supreme Court first set forth the discriminatory intent requirement in *Washington v. Davis*, 426 U.S. 229 (1976).

173. *See, e.g.*, David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 940 (1989) (stating that the idea of impartiality with respect to the races is the equivalent of the discriminatory intent approach to racial discrimination); *cf.* Robert E. Goodin & Andrew Reeve, *Liberalism and Neutrality*, *in* LIBERAL NEUTRALITY 1 (Robert E. Goodin & Andrew Reeve eds., 1989) ("The essays presented here locate neutrality by reference to ideas like impartiality, even-handedness, absence of bias, equality of treatment, and indifference.").

174. Leubsdorf, *supra* note 34, at 240, 247. Disqualification law is not only concerned with biased decision-making; it is also concerned with appearances. *See id.* at 268. Moreover, as Professor Leubsdorf points out, "traditional disqualification law [excludes] not the most powerful motives but the most reprehensible ones." *Id.* at 285.

175. Current disqualification law usually does not use the judge's errors in deciding a case as a "good reason to believe that something is bending the judge's judgment." *Id.* at 266.

Second, we might require motive to prove bias because the claim of bias or lack of neutrality implies a judgment of blameworthiness. In evaluating individual decision-making, we generally want to avoid ascribing blame too easily. Conduct intended to cause a specified harmful result is considered more blameworthy than conduct that causes the same harm inadvertently.[176] Even though these two reasons may justify requiring motive to show lack of neutrality with reference to decisions made by individuals, they do not apply with the same force to institutional decision-making. Ascriptions of blame do not have the same moral connotation when we are dealing with institutions. Furthermore, as others have pointed out, requiring a particular state of mind assumes that it is feasible to identify an individual whose intent or purpose can be evaluated. When we are dealing with multi-member bodies such as rulemakers or legislatures, the evaluation of motive requires a judgment as to which members' or how many members' motives should be evaluated.[177] This judgment, although perhaps necessary in some situations, is inherently artificial.

Although Marcus' argument regarding motive seems to draw its power from its analogy to how we think about bias with regard to individual judges, it is not an apt analogy for the reasons discussed above. Perhaps the more appropriate analogy would be to group decision-making, such as that by legislatures. In evaluating this analogy, debates within constitutional law over motive and disparate impact may be helpful.

The Supreme Court first established the motive requirement for equal protection claims in *Washington v. Davis*.[178] There is a voluminous literature cataloguing the arguments for and against the use of motive as the standard for equal protection law.[179] For our purposes, the key point is that, for some, using motive or intent seems to flow automatically from what they perceive as the central purpose of the equal protection clause—prohibiting decision-making based upon illicit considerations.[180] Moreover, using intent or motive is also closely related to process theories

176. *See* Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 985 (1993).

177. *See* Christina B. Whitman, *Government Responsibility for Constitutional Torts*, 85 MICH. L. REV. 225, 248-49 (1986).

178. 426 U.S. 229 (1976).

179. *See, e.g.*, Gayle Binion, *"Intent" and Equal Protection: A Reconsideration*, 1983 SUP. CT. REV. 397; Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36 (1977); Flagg, *supra* note 176; Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 50-52 (1977); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105 (1989); Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540 (1977); Eric Schnapper, *Perpetuation of Past Discrimination*, 96 HARV. L. REV. 828 (1983); Robert A. Sedler, *The Constitution and the Consequences of the Social History of Racism*, 40 ARK. L. REV. 677 (1987); Strauss, *supra* note 173.

180. *See* Perry, *supra* note 179, at 548-49. Perry, however, does endorse a role for disproportionate impact in appropriate circumstances. *See id.* at 571-85.

using intent or motive is also closely related to process theories of judicial review that approve of judicial intervention only when there is sufficient evidence that the political process has been tainted.[181]

Regardless of the validity of such analysis within its own domain—equal protection law—these reasons do not necessarily apply to the neutrality of procedural rules. The claim that a motive requirement arises from the meaning of the equal protection clause says nothing about whether a similar requirement arises from applying the concept of neutrality to procedural rules. Furthermore, the rationale that motive ought to be a requirement of equal protection jurisprudence in order to limit the power of the judiciary (a non-democratic branch of government) to invalidate choices made by the legislature has no applicability here. The current rulemaking process is hardly democratic. Moreover, a procedural rule will not be invalidated automatically when a claim of non-neutrality is presented.[182] What is at stake in this debate is the legitimacy of such a claim.

To answer the question of why motive might be a necessary requirement for deeming procedural rules to be non-neutral, we must look to other reasons. Justice White's majority opinion in *Washington v. Davis* offers one such reason. Justice White stated for the Court that a rule that:

> a statute . . . is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.[183]

From this perspective, the biggest problem with an impact rule is overinclusiveness. If we allow differential impact to serve as sufficient to validate a claim that a rule is non-neutral, all procedural rules might be considered non-neutral because, in the real world, all procedural rules potentially have differential impact.[184]

While this is a valid concern, it does not necessarily lead us to the con-

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181. *See* Binion, *supra* note 179, at 403-04.

182. It is conceivable that impact data could be used as part of an argument that a rule violates the equal protection clause, but nothing in the argument in the text requires abandonment of motive as a requirement for violation of the equal protection clause.

183. Washington v. Davis, 426 U.S. 229, 248 (1976).

184. *Compare* Phyllis Tropper Baumann et al., *Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases*, 33 B.C. L. REV. 211, 218 n.26 (1992) ("Of course, virtually any procedural rule can have a disparate impact on those who can least afford lawyers or who have less relevant information at their disposal."), *with* Stephen B. Burbank, *Ignorance and Procedural Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 846 (1996) ("We . . . know the difference between the inevitable non-neutrality of procedure and the notion that the rulemakers are or might as well be animated by an overtly political agenda.")

clusion that we ought to reject arguments based upon impact. There are less drastic alternatives besides the complete rejection of the relevance of impact data.[185] Once we have accepted the relevance of such data, the important question is how such data affects our analysis. Under the traditional two-tiered standards of equal protection law, if impact data are accepted and differential impact shown, particularly in the context of racial discrimination, virtually no challenged law could survive the burdens of the Court's strict scrutiny review.[186] However, in considering the relevance of impact data on the question of whether a procedural rule is neutral there are other possibilities. Where the data shows disparate impact it does not necessarily follow that non-neutrality has automatically been proven. At the same time, however, data is relevant to showing that a rule is non-neutral, however, and ought not to be dismissed simply because there is no proof of bias or improper motive in the promulgation of the rule.

Professor Marcus is not wrong to claim that aspiration is significant in the writing of rules. Where we differ is whether that ends the inquiry. What I am claiming is that proof of disparate impact requires further conversation. It requires justification. The larger the disparate impact, the greater the need for justification. If I have succeeded in showing that the choice of definition of neutrality is just that—a choice—rather than one particular definition that can be proven correct, I believe that there are reasons to prefer a definition of neutrality in this context that allows for looking at the data.

First, even if we accept Professor Marcus' argument that the rulemakers have no substantive preferences, the choice to prefer procedural values, such as efficiency, over substantive ones, such as enforcement of particular kinds of claims, is still a political judgment. The way to know when such judgments have been made and what their significance is requires looking at the evidence under the rules. Second, if we require proof of improper motive to show lack of neutrality, we are choosing a particular definition and a distinct view of neutrality because of the underlying assumptions about the rulemaking process that would result if we made a different

185. Another response might be to reject the concept of neutrality. If all rules have non-neutral effects, perhaps we should abandon the pretense that procedural rules are neutral and require validation of them on other grounds. *See* Eskridge, *supra* note 45, at 962-73 (arguing that another approach would be to adopt the idea that good results are evidence of good procedures).

186. In cases involving gender discrimination, it appears that the Supreme Court uses an intermediate level of scrutiny. See *United States v. Virginia*, 518 U.S. 515 (1996) (Rehnquist, C.J., concurring), for a discussion of the intermediate scrutiny standard for gender discrimination devised in *Craig v. Boren*, 429 U.S. 190 (1976). For discussions of this level of scrutiny, see Deborah Hellman, *Two Types of Discrimination: The Familiar and the Forgotten*, 86 CALIF. L. REV. 315 (1998); Michael Stokes Paulsen, *But Cf. . . . Medium Rare Scrutiny*, 15 CONST. COMMENT. 397 (1998); and Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298 (1998).

choice.[187] It would be better to uncouple the debate about who makes the rules from the question of whether particular rules are neutral or not. One should be able to consider data that shows that the 1983 version of Rule 11 is non-neutral without demanding proof of bias in the making or application of the rules.

In summary, if Rule 11 has been used against a particular type of case disproportionately to its numbers in the caseload, such data creates a presumptive case for non-neutrality. However, further discussion is necessary before we can conclude that there is a violation of the norm of procedural neutrality. The fact that a particular group or case type is being treated worse than we might expect based upon its numbers in the relevant population creates a demand for explanation; it does not conclusively prove that there has been unequal treatment or lack of neutrality.[188] We have to consider whether there are plausible "neutral" reasons for the disproportionate impact upon civil rights cases. That discussion is the task of the next section.

IV. "NEUTRAL EXPLANATIONS"

In addition to those who challenge the significance of impact data,[189] some commentators argue that there are neutral explanations for the findings of disproportionate impact. The claim is that even if we accept the conclusion of these studies that civil rights cases were disproportionately affected by the 1983 version of Rule 11, lack of neutrality is not the best explanation for this phenomenon. These critics say that there are other, more plausible, neutral reasons for civil rights cases being singled out for Rule 11 sanctioning activity.

The principal "neutral explanation" offered to explain the results of the

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187. *See supra* notes 126-165 and accompanying text.

188. The idea of demand for explanation or justification for differential impact is obviously not new. In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the United States Supreme Court held that in statutory actions under Title VII, the plaintiff could establish a prima facie case by demonstrating that an employment practice resulted in differential racial impact. *See Griggs*, 401 U.S. at 431. This entitled the plaintiff to judgment unless the employer justified the employment practice by showing that it was substantially related to job performance. *See id.* But see *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), where the Supreme Court held that the burden of persuasion on the question of business justification lies with the plaintiff, not the employer. *See id.* at 659. *Wards Cove Packing Co.*, in turn, was reversed by the Civil Rights Act of 1991. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 1981(a)(2) (1991)) (prohibiting the use of "business necessity" as a defense against claims of intentional discrimination). In constitutional litigation, Sheila Foster has argued that there are areas such as grand jury selection where the Court has required the state to provide an explanation once disparate impact has been shown. *See* Sheila Foster, *Intent and Incoherence*, 72 TUL. L. REV. 1065, 1079-81 (1998); *see also* David Crump, *Evidence, Race, Intent, and Evil: The Paradox of Purposelessness in the Constitutional Racial Discrimination Cases*, 27 HOFSTRA L. REV. 285 (1998) (arguing, on the basis of *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), that the Supreme Court should adopt a test of requiring proof of a legitimate purpose for differential impact).

189. *See supra* Part III.

Rule 11 studies is that civil rights cases are more likely to be frivolous than other types of cases.[190] Judge Bertlesman, at hearings held to discuss amending the 1983 version of Rule 11, put the argument this way: "It may be something about civil rights cases that causes cases without merit to be filed. There may be something about civil rights cases that are properly sanctioned."[191] If this statement were accurate, it would appear to be an answer to the claim of lack of neutrality. Lack of merit, if applied even-handedly, would seem to be a procedurally neutral explanation.[192]

The FJC Study, discussed earlier, also suggests the "lack of merit" or frivolousness explanation for Rule 11's impact upon civil rights cases.[193] The Study conducted an analysis of all civil rights cases that had sanctions

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190. The other reason that has been offered is that case types other than civil rights cases include a large number of routine cases that are less susceptible to sanctioning activity. For example, Thomas Willging, author of several studies of Rule 11 for the Federal Judicial Center, states that:

> routine actions, often filed by the United States as a plaintiff, to enforce obligations owed to the federal government based on student loans, federally insured mortgages, overpayments of federal benefits, or the like . . . typically require little, if any, judicial action . . . [while] civil rights, securities, antitrust, and other commercial matters represent much higher burdens to the courts.

WILLGING, *supra* note 13, at 161-62. From this he reasons that these "higher burden" cases are at more risk for Rule 11 sanctions because more court activity correlates with "the need and opportunity for a judge to impose sanctions." *Id.* at 162. Therefore, "one would expect a civil rights employment discrimination case to be more likely to generate sanctions than a case involving contractual enforcement of a student loan." *Id.* at 162. The data does not allow us to evaluate this hypothesis, however.

191. *Committee on Rules Transcript*, *supra* note 53, at 155 (statement of Judge William O. Bertlesman).

192. The terms "lack of merit" and "frivolousness" are not necessarily synonymous. *See infra* notes 213-227 and accompanying text. However, I believe it is fair to say that in the context Judge Bertlesman was using, by the phrase "lack of merit," he intended to mean frivolous. *Committee on Rules Transcript*, *supra* note 53, at 155 (statement of Judge William O. Bertlesman). Moreover, the reasons why the case lacks merit are not necessarily neutral. The substantive law may put requirements on a claim that make it very difficult for that particular kind of claim to pass a threshold of "frivolousness." As I argue later, the definition of where to draw the line between frivolous and non-frivolous is not necessarily neutral. *See infra* notes 225-227 and accompanying text.

193. FJC STUDY, *supra* note 13. Professor Louis has advanced a variation of the argument that civil rights cases are more likely to be frivolous. He states that:

> Even before the adoption of Rule 11, civil rights cases were regarded as a major source of meritless litigation and had already become the subject of increased interception efforts. Thus, it was perhaps inevitable that plaintiffs asserting these and other disfavored or troubling claims would initially be the most visible targets of the new rule.

Louis, *supra* note 15, at 1055. There is some ambiguity in Professor Louis' statement as to whether he is being merely descriptive or also whether he agrees with this argument. His statement suggests that rather than reality, it is perceptions about civil rights cases being frivolous that explains the Rule 11 studies. *See id.* It may be accurate that there is a perception that civil rights cases are more likely to be frivolous. *See* Theodore Eisenberg & Stewart J. Schwab, *What Shapes Perceptions of the Federal Court System?*, 56 U. CHI. L. REV. 501 (1989) [hereinafter Eisenberg & Schwab, *What Shapes Perceptions*]. However, if these perceptions are not correct, then the fact that they result in a disproportionate number of civil rights cases being sanctioned would seem to prove that Rule 11 was not being neutrally applied. False perceptions directed at one type of case are similar to prejudices directed at one racial group. We would hardly allow somebody to claim that they are acting neutrally because they sincerely held their prejudice or false stereotypes. The question becomes, therefore, whether these perceptions are accurate.

imposed on them in the five districts studied and concluded that the sanctions were justified in each of these cases. According to the study, none of the cases appeared to be ones that a "reasonable" lawyer would bring.[194] The evidence from the FJC Study is hardly conclusive, however. Perhaps if the files of sanctioned cases in other areas were also read, they too might seem to lack any merit. If so, this would not explain why civil rights cases are being treated differently. At best, the FJC Study supports an argument that sanctions are justified in civil rights cases where they have been issued. This may lead to the inference that judges issuing sanctions have not evidenced any bias, but does not by itself support the conclusion that the differential impact of Rule 11 activity on civil rights cases has been justified. We still need an explanation for why more sanctions are issued in civil rights cases than their numbers in the overall caseload would suggest. More significantly, we also need an explanation for the data that shows that there were a disproportionate number of sanction motions filed against civil rights cases.[195]

The frivolous case explanation offered by Judge Bertlesman and the FJC Study for the disproportionate number of sanctions and motions is arguably supported, although in a weak way, by a study conducted by Professor Eisenberg.[196] Eisenberg used data from the Administrative Office of the Federal Courts to examine trial outcomes in civil rights and prisoner cases for the period from 1978 through 1985. He concluded that the success rates for civil rights cases, including employment discrimination, were far below the reported trial success rates for other kinds of litigation.[197] This finding that civil rights cases lose more frequently than other types of cases might be used to support the conclusion that civil rights cases tend to be less meritorious than other cases.

Drawing conclusions from the Eisenberg study, however, presents a number of difficulties. "Losers" are not necessarily frivolous cases.[198] Furthermore, as Eisenberg argues, generalizing from decided cases to all disputes in a category is difficult, if not impossible.[199] We could generalize

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194. *See* FJC STUDY, *supra* note 13, § 1(c)(4).

195. *See infra* notes 233-47 and accompanying text.

196. *See* Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567 (1989) [hereinafter Eisenberg, *Litigation Models*].

197. *See id.* at 1578. The exceptions were in two sub-categories of cases: voting rights and accommodations. *See id.* Eisenberg's data is corroborated by several other studies. Schwab and Eisenberg studied constitutional tort litigation in several districts and found comparable results. *See* Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorneys' Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 729 (1988) [hereinafter Schwab & Eisenberg, *Explaining Constitutional Tort Litigation*]. Siegelman and Donohue report that the success rate of employment discrimination litigation is significantly below 50%. *See* Siegelman & Donohue, *supra* note 64, at 1155.

198. *See infra* notes 213-25 and accompanying text.

199. *See* Eisenberg, *Litigation Models*, *supra* note 196, at 1568. Eisenberg describes what he calls "expectations theory," a theory which states that disputes that reach trial are a biased sample of all

from the Eisenberg data with more confidence if we had reasons that might explain why civil rights cases would be more frivolous than other kinds of cases. Such reasons would also help us evaluate the neutrality of the "frivolous case" explanation. If, for example, one such reason were the judicial hostility to civil rights claims, it might be appropriate to include such bias into consideration of the neutrality of Rule 11 and then claim that Rule 11 is not neutral because judges use it to penalize cases they do not like. On the other hand, if the reason were that civil rights lawyers bring unworthy cases, our conclusion would also be different.

One possible explanation for the Eisenberg findings is that the attorneys who bring civil rights cases are less competent than other attorneys. However, as Schwab and Eisenberg conclude, this seems unlikely to be true.[200] Another possible explanation may be with the institutional structure in which civil rights attorneys practice. Rule 11 is based upon a straightforward version of the deterrence theory. It assumes that if enforcement is reasonably certain, behavior considered abusive will be curbed because a rational actor who calculates the benefits and costs of different kinds of behavior in advance will be influenced significantly by economic factors. If, however, these are not accurate assumptions about the lawyers, the clients and the institutions that bring civil rights cases, then perhaps we can develop reasons why civil rights cases seem to be disproportionately affected by the 1983 version of Rule 11.

It is difficult to know the extent to which there is a distinctive civil rights bar. The Heinz and Laumann study of the Chicago Bar illustrates that, although our core image of the civil rights lawyer may be the lawyer who works for an organization such as the NAACP Legal Defense Fund, lawyers who do civil rights litigation work in a variety of different set-

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disputes. *See id.*; *see also* Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581 (1998) (concluding that win rate data is ambiguous because it is based only on cases brought to trial); Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 4 (1996) ("Scholars are unanimous in recognizing that trials are *not* representative of the mass of litigated disputes."). The reasons for this difference between tried cases and cases that do not go to trial are varied. Tried cases tend to be cases that have high stakes, or extreme uncertainty about the outcome, or differential stakes, particularly where one side has reputational concerns. *See* Gross & Syverud, *supra* at 4; *accord* Clermont & Eisenberg, *supra* at 589-90 (claiming that different stakes and case strength factor into which cases are brought to trial). Eisenberg does attempt to offer explanations as to why civil rights cases might lose more often than other cases. He tentatively concludes that low success rates in prisoner cases may reflect the poor quality of the cases and the reduced selection effect that accompanies cases with low litigation costs. *See* Eisenberg, *Litigation Models*, *supra* note 196, at 1601. Low success rates in employment discrimination cases may reflect differential stakes. *See id.*

200. *See* Schwab & Eisenberg, *Explaining Constitutional Tort Litigation*, *supra* note 197, at 769. Relying on data from the Heinz and Laumann study of the Chicago Bar, *see infra* note 201, Schwab and Eisenberg conclude that civil rights practitioners are more likely to come from elite law schools and are regarded as average by their peers. *See* Schwab & Eisenberg, *Explaining Constitutional Tort Litigation*, *supra* note 197, at 769.

tings.[201] To the extent that there are a greater number of civil rights lawyers who work for these kinds of organizations relative to other lawyers, it would seem that, all other things being equal, these organizational lawyers would be less influenced by Rule 11 than private practitioners.[202] This would be the case for two reasons. One is that the goal of such salaried lawyers would not be to directly maximize their own income. Hence economic sanctions should have less effect upon them. Second, organizational civil rights lawyers may be motivated more by ideology than other lawyers. Therefore, a possible explanation for the greater number of civil rights cases that have been sanctioned is that civil rights lawyers may be less influenced by economic considerations than other lawyers. These lawyers may be more willing to engage in behavior that tests the limits of the rule. One study of class action lawyers suggests that this indeed may be the case.[203] But this hypothesis requires further supporting evidence. A recent study concludes that because there is a high demand for representation, civil rights lawyers, including those who work for organizations, pick and choose their cases. They screen cases carefully and attempt to pick "winners."[204] In addition, the differences between private and organizational

201. Their study reported that 14 of the respondents (2%) spent 25% or more of their time on civil rights work, and of those 14, 50% were government employees. *See* JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 79 n.18 (1982). It is unclear whether these government lawyers were pursing civil rights claims (e.g., lawyers who work for the EEOC) or defending against them (e.g., lawyers who represent public officials being sued for civil rights violations). Twenty-nine percent of civil rights lawyers in the study were in firms of 10 or less, and 13% were in firms of more than 30. *See id.* The size of their sample limits the conclusions one can draw from this data. *See also* Julie Davies, *Federal Civil Rights Practice in the 1990's: The Dichotomy Between Reality and Theory*, 48 HASTINGS L.J. 197, 199 (1997) ("[P]ractices of civil rights attorneys differ so much from one another that asking questions about civil rights litigation in general is often not very productive.").

202. If one were to study this question further, it seems plausible to divide lawyers who do civil rights work into two basic categories: those who work for organizations and those who are in private practice and are dependent upon fees, either from a percentage of the client's recovery or from court awarded fees. There may be, however, significant differences within each group. For example, a lawyer could work for an organization with a prime agenda of doing civil rights work, or she could work for an organization, such as legal services, that has other goals. Moreover, the way in which particular cases are selected can vary. Although it is typical to have some formal screening process, such as a case selection committee, *see* NAN ARON, LIBERTY AND JUSTICE FOR ALL: PUBLIC INTEREST LAW IN THE 1980S AND BEYOND 99 (1989), both the criteria used and the degree of discretion afforded the staff attorneys can vary significantly. *See* Stephen L. Wasby, *The Multi-faceted Elephant: Litigator Perspectives on Planned Litigation for Social Change*, 15 CAP. U. L. REV. 143, 146-48, 183 (1986). There are also significant differences within the group of lawyers dependent upon fees. The most critical difference is between lawyers who only occasionally do a civil rights case and the small group of private lawyers who have a specialty in at least some aspect of civil rights work, such as employment discrimination.

203. This study of class actions found that private lawyers did not bring what the study called innovative litigation, but that institutional lawyers, such as legal services lawyers, did. *See* Bryant Garth et al., *The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation*, 61 S. CAL. L. REV. 353, 375-77 (1988).

204. *See* Davies, *supra* note 201, at 238.

lawyers may be mediated by organizational concerns. Even if the threat of economic sanctions does not directly influence salaried lawyers, it may be important to the organizations that employ them.[205]

Apart from the characteristics of the lawyers who bring civil rights cases, another possible explanation for why civil rights cases might be considered less meritorious is the characteristics of the cases themselves. First, it has been argued that civil rights cases are more likely to be sanctionable because civil rights law is an area of rapidly changing rules and therefore inherently more risk prone to Rule 11 activity.[206] Second, it has also been suggested that besides penalizing risk, the 1983 version of Rule 11 was likely to sanction cases in which performing an adequate pre-filing inquiry is difficult.[207] For example, many civil rights cases involve an inquiry into the state of mind of the defendant. This information is often difficult to obtain before litigation. Therefore, one could hypothesize that Rule 11 would have a more significant effect on civil rights cases because they involve a greater degree of investigation into information solely in the control of the defendant.

These two reasons—unclear law and lack of information—as to why Rule 11 might have a disproportionate impact upon civil rights cases may be viewed as neutral reasons because many other kinds of cases also potentially involve unclear law and information that is in the control of the defendant. However, if the rulemakers knew that these attributes are not evenly distributed across case types, then the decision to write a rule that sanctions cases involving these attributes is not neutral.[208] The rule may be

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205. Komesar and Weisbrod hypothesize that public interest firms are maximizers of publicity. *See* Neil K. Komesar & Burton A. Weisbrod, *The Public Interest Law Firm: A Behavioral Analysis*, *in* PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS 80, 88-89 (Burton A. Weisbrod et al. eds., 1978). If this were true, it would seem to have offsetting effects. It might lead such firms to emphasize risky cases in new areas. *See id.* On the other hand, it might make such organizations cautious about the types of cases they bring because frivolous cases would generate unfavorable publicity.

206. *See* LaFrance, *supra* note 12, at 353; Tobias, *Rule 11 and Civil Rights Litigation*, *supra* note 12, at 496-99; *cf.* AJS Study, *supra* note 13, at 967 (suggesting that it might be the complexity of civil rights cases that explains the prevalence of sanctions).

207. In the 1993 amendments to Rule 11, the rulemakers tried to ameliorate the effects of lack of pre-filing information by allowing a plaintiff to state that the allegations or factual contentions "are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." FED. R. CIV. P. 11(b)(3). This revision lodges significant discretion in the trial judge to decide what is a reasonable opportunity. It also does not deal with the case where the plaintiff's lawyer cannot in good faith claim that the contentions are *likely* to have evidentiary support because she does not know the strength of the case or the likelihood of obtaining supporting evidence until she has an opportunity to do discovery.

208. *See* Yablon, *supra* note 127, at 104-05. Compare Benjamin Kaplan, *Comment on Carrington*, 137 U. PA. L. REV. 2125, 2126-27 (1989), which discusses the changes to the class action rule in the 1960s. *See id.* at 2126-27. Kaplan states that, despite the fact that the rule was neutral on its face, the rulemakers could conclude that it would make changes in substance and, therefore, "there was a sense in which the amended rule was not neutral." *Id.*

justified, but it should not be treated as an example of a neutral rule.

Furthermore, these attributes of unclear law and lack of information explain, at best, why civil rights lawyers might bring risky cases, not why they bring frivolous cases. This raises the second major difficulty with extrapolating from the Eisenberg data, namely that a higher percentage of losing cases does not necessarily correlate with a higher percentage of frivolous cases. In an important article discussing Rule 11 and this distinction between losing cases and frivolous cases, Charles Yablon argues that the data showing a disproportionate impact upon civil rights cases is explained by the fact that civil rights cases are more likely to be "long shots."[209] As Yablon states, "the likelihood that a claim will be sanctioned as frivolous seems directly correlated with the likelihood the claim will be a loser."[210] He has two reasons for this conclusion. First, judges may perceive long shots as frivolous cases, even though they are not.[211] Second, because Rule 11 motions are almost always to be directed at losing cases, any case category that has a higher incidence of losing cases will be disproportionately represented among sanctioned cases.[212]

The first of these reasons raises a fundamental problem with the frivolous case hypothesis. We lack objective standards for determining what a frivolous case is.[213] As Yablon argues, long shots are not necessarily frivolous cases; they are cases with low probability of success. Frivolous cases, according to Yablon, are cases that have "no chance of success and should never have been brought."[214] Even if we disagree with Yablon's definition of a frivolous case, we are left with the problem of coming up with an agreed-upon standard. This is more difficult than it may first seem.[215]

Robert Bone discusses this problem in a recent article.[216] One possible definition of a frivolous case is what is called a net expected value (NEV)

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209. *See* Yablon, *supra* note 127, at 96-97.

210. *Id.* at 87.

211. *See id.* at 76-81, 95; *see also* Eisenberg & Schwab, *What Shapes Perceptions*, *supra* note 193, at 539 (discussing the factors which affect a judge's perception of a case).

212. *See* Yablon, *supra* note 127, at 86-87. This is not a formal requirement of the Rule, but it is probably a requirement in practice.

213. *See* Sanford Levinson, *Frivolous Cases: Do Lawyers Really Know Anything at All?*, 24 OSGOODE HALL L.J. 353, 369-70 (1987).

214. Yablon, *supra* note 127, at 67.

215. The likelihood of success is not the only factor which determines whether a case is non-frivolous; there can be differences in judgment in valuing either the potential end result of litigation, particularly where the relief is non-monetary, or the process of allowing individuals to give voice to their grievances.

216. *See* Robert Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 529-34 (1997) [hereinafter Bone, *Modeling Frivolous Suits*].

case. This is a case where the expected award[217] is less than the litigation costs. As Bone points out, defining all such cases as frivolous seems odd because some of them may have a high probability of success.[218] These cases may not be viable to bring because of litigation costs,[219] but they are not frivolous. Another definition Bone considers is that a lawsuit is frivolous if the plaintiff files the case believing that there is only a very small likelihood that the defendant is liable.[220] Bone rejects this definition because it might preclude cases that advance novel legal theories.[221]

Bone concludes with a two-pronged definition of frivolous: a lawsuit is frivolous "if a plaintiff files suit knowing facts that decisively establish little or no chance of the defendant's objective liability on the basis of any of the legal theories plaintiff alleges" or if a "plaintiff files without conducting a reasonable pre-filing investigation when such an investigation would have revealed facts establishing little or no chance that the defendant was actually liable on any of the legal theories alleged."[222] The first of these definitions tries to avoid the problem of discouraging novel claims, although it still leaves open the question of what is a low enough degree of probability of victory that we can agree to attach the label frivolous to a case.[223] Yablon considers cases that have at least a ten percent chance of winning to be non-frivolous.[224] Others might disagree. However, it does not matter where the dividing line is because the decision of where we draw the boundary between sanctionable and non-sanctionable conduct is ultimately a political issue. In penalizing long shots we make a value judgment to prefer efficiency over open access to court.[225] Can this decision, however, count as a neutral explanation?

In answering this question, we need to consider what is meant by a neutral explanation. We have to specify the characteristic that the explanation has to be neutral towards. For example, in employment discrimination law we find discussions of whether an employer's reason for acting is race-neutral or gender neutral. In other areas, we find references to agent-neutral reasons for action, and in philosophical works, to the idea of neu-

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217. Expected award is the likely recovery multiplied by the probability of receiving the recovery. This calculation can become more complicated where there are not binary outcomes, but a range of possible expected outcomes.

218. *See* Bone, *Modeling Frivolous Suits*, *supra* note 216, at 529-30.

219. *See id.* Some litigants may still file these cases because they assume they can be settled or, alternatively, because there are reasons for bringing the lawsuit other than financial interests, such as establishing a precedent or ideological points. In theory, these other goals can be monetized and assimilated into the standard expected value analysis. I think it makes sense to keep them separate because their value is frequently ignored in standard discussions of the problem.

220. *See id.* at 531.

221. *See id.*

222. *Id.* at 531-32 (emphasis omitted).

223. *See id.*

224. *See* Yablon, *supra* note 127, at 72, 95.

225. *See id.* at 103.

trality toward conceptions of the good life. Drawing on our earlier discussion of procedural neutrality, it appears that the appropriate reference point for our discussion is the neutrality toward substantive claims. Accordingly, a neutral explanation has to be something that not only refers back to procedural values,[226] but also one that has to account for the differential treatment. But if referring back to procedural values is a necessary requirement, it is not sufficient to satisfy what we mean by a neutral explanation. The reason we originally accepted the idea of transubstantive rules as part of the requirement of neutral rules was because of our belief that procedure should be apolitical. Yet the decision about the tradeoff between access for certain types of claims and efficiency is not apolitical.[227]

Professor Bone's second category—lack of reasonable investigation—may not raise the problem of value judgments,[228] but it does return us to the question raised earlier: is there anything about the characteristics of civil rights attorneys or civil rights cases that would explain why there would be more instances of lack of reasonable investigation on the part of civil rights attorneys as compared to other attorneys? The most plausible reason for attorneys failing to make reasonable investigation is one based upon the insights of John Coffee.[229] He notes that in some types of litigation, plaintiffs' lawyers might bring a particular case as part of a portfolio of cases.[230] Since, in effect the lawyer is engaged in risk diversification by bringing many cases, he does not invest much time or resources in any one of them. Instead, the lawyer uses the discovery process for the purpose of finding out which cases warrant further investment. There is no reason to believe, however, that civil rights attorneys are more likely than other attorneys to engage in this type of risk diversification.

Another, but not mutually exclusive, explanation for the data showing a disproportionate degree of sanctions issued in civil rights cases is that

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226. Applying this concept of a neutral explanation is tricky business. First, drawing a line between procedure and substance is not always possible. Second, assuming we can overcome that hurdle, the explanation has to account for the differential treatment in a way that is evenhanded toward substance. However, once we introduce the requirement of being evenhanded toward substance, it may appear that we have reintroduced the idea of looking for an illicit motive. I think not. When I refer to an explanation, I am not looking to the motive of the rulemakers. The explanations we are examining deal with the procedural system or case characteristics that account for the disparate impact regardless of what was the motive of the rulemakers.

227. Assume that we accept that efficiency is a procedural value. Eliminating all civil rights cases (or all products liability cases) from the court system would arguably serve the procedural goal of efficiency, but then such decisions are not apolitical. *Cf.* Jack B. Weinstein, *Procedural Reform as a Surrogate for Substantive Law Revision*, 59 BROOK. L. REV. 827, 836 (1993) ("Many of the recent procedural reforms appear to me to be surrogates for direct curtailment of substantive rights. This is because virtually all of them share a common characteristic: they limit court access. . . .").

228. *See* Bone, *Modeling Frivolous Suits*, *supra* note 216, at 532.

229. *See* John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 704-05 (1986).

230. *See id.*; Yablon, *supra* note 127, at 74-75.

more sanction motions are filed against civil rights lawyers. Therefore, there are more opportunities for judges to issue sanctions against civil rights cases. This explanation fits the data from three of the four studies,[231] and it also accords with one of Professor Yablon's suggested reasons for more sanctions being issued against civil rights cases.[232] However, as stated earlier, this explanation also raises a final problem with the frivolous case excuse. We need an explanation not only for the disproportionate number of sanctions issued against civil rights cases, but also for the disproportionate number of motions filed against civil rights cases. Showing that sanctions are deserved in the cases where they are issued does not necessarily mean that the disproportionate number of motions filed is justified. Cases that result in sanctions are not a random sample of either civil rights cases or even civil rights Rule 11 cases.[233] This distortion is likely to be greater when we are trying to generalize from sanctions issued to motions filed because Rule 11 motions might be filed for tactical reasons.[234] In these strategic Rule 11 cases, the result is likely to be some effect on the disposition of the underlying case rather than a ruling on the Rule 11 motion.

Although much of the concern over the relationship between the 1983 version of Rule 11 and civil rights cases was over the alleged disproportionate number of sanctions issued, the more important issue may be the one involving the disproportionate number of motions filed against civil rights cases. As we have all been taught, most cases settle.[235] Therefore, we need to consider the extent to which the filing of a Rule 11 motion might influence the settlement of a case or the behavior of lawyers who bring civil rights cases.[236]

The data collected in the Rule 11 studies is inconclusive. Only one of

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231. *See supra* notes 81-85 and accompanying text. A higher percentage of sanction motions relative to numbers in caseload does not necessarily translate into a higher percentage of sanctions relative to numbers in caseload. By itself this might just mean that there is more sanctioning activity, but a low percentage of sanctions granted. The data, however, from three of the four Rule 11 studies shows both a disproportionate number of motions and sanctions granted against civil rights cases.

232. *See* Yablon, *supra* note 127, at 344.

233. We would have to assume that we can generalize from cases where sanctions have been issued to the universe of civil rights cases. There is no evidence that this is possible. As discussed earlier, looking solely at tried or litigated cases does not give us an accurate picture of the universe of cases in an area. *See supra* note 181 and accompanying text.

234. *See* Mark S. Stein, *Rule 11 in the Real World*, 132 F.R.D. 309, 312 (1990).

235. *See, e.g.*, Herbert M. Kritzer, *Adjudication to Settlement: Shading in the Gray*, 70 JUDICATURE 161, 162-64 (1986) (finding that approximately two-thirds of the federal and state cases studied settled without a definitive judicial ruling; 9% settled after a ruling on a significant motion; 7% were resolved via trial and 15% were resolved through some other fashion).

236. There are two kinds of settlement effects that might be significant. Rule 11 could change the relative mix of cases that are settled versus cases that go to trial—cases that otherwise would be settled might go to trial or vice versa. The second type of settlement effect is distributional. Even if Rule 11 did not change the mix of settled versus tried cases, it might change the dollar amount at which certain cases are settled.

the four studies—the Hess Study—looked at the impact of Rule 11 on negotiation, but it did not attempt to single out civil rights cases.[237] Moreover, it asked about the impact of Rule 11 in general as opposed to the filing of a Rule 11 motion.[238] Its findings were that 78% of the surveyed attorneys felt that Rule 11 had no effect on the likelihood of any settlement.[239] In another study, which was not among the four discussed earlier, attorneys were asked what the effect sanction orders had upon settlement.[240] As with the Hess Study, this study did not ask about the effect of sanction motions. Approximately 73% of the respondents answered that sanction orders had no effect on settlement negotiations.[241] On the other hand, a study looking at the impact of the U.S. Supreme Court attorney fee decisions upon the behavior of civil rights lawyers found significant negotiation effects.[242] Finally, the AJS Study found that lawyers who represent civil rights plaintiffs[243] were more likely to be affected by Rule 11 than other lawyers.[244] Most significantly, 31% of plaintiffs' civil rights lawyers reported that they had, at least, once decided not to assert a claim or defense that they felt had potential merit.[245] This compares to 20.5% for all lawyers who gave the similar response.[246] Whether this effect upon civil rights lawyers is caused by the disproportionate impact of sanction motions is impossible to tell. The AJS Study's conclusion was that that there was "little correlation between the risk of Rule 11 sanctions that a certain group of lawyers face and their level of reaction to the rule."[247] Again, however, this focuses on the effect of sanctions issued rather than the effect of sanction motions. Ultimately, we have to conclude that we do not know the effect, if any, of sanction motions as opposed to sanction orders.

Yablon uses his thesis about losing cases to explain the higher level of sanctions in civil rights cases.[248] It would also appear to be a possible explanation for the overall sanctioning activity. To the extent that bringing a losing case is a necessary requirement for filing a Rule 11 motion, Yablon's argument would explain the disproportionate number of Rule 11 motions filed against civil rights cases.[249] But this explanation still returns us to the question of whether it is consistent with neutrality to say that

237. *See* Hess Study, *supra* note 13, at 329 chart 14.
238. *See id.*
239. *See id.*
240. *See* WILLGING, *supra* note 13, at 115-20.
241. *See id.* at 116 tbl.17.
242. *See* Davies, *supra* note 201, at 215.
243. *See* AJS Study, *supra* note 13, at 971. This was defined as lawyers who stated more than 50% of their practice was civil rights work. *See id.* at 971, 973 tbl.14.
244. *See id.* at 971.
245. *See id.* at 973 tbl.14.
246. *See id.* at 963 tbl.7.
247. *Id.* at 962.
248. *See* Yablon, *supra* note 127.
249. *See supra* note 194 and accompanying text.

cases that are more likely to lose are appropriate for sanctioning. As I have argued above, it is not.

To summarize the argument made in this section, to be considered a neutral excuse, the frivolous case hypothesis needs additional empirical evidence to explain both the disproportionate number of sanctions issued and sanction motions filed. It also has to come up with a neutral way to define frivolous. Frivolousness may be a neutral concept; how we define what it means is not.

Disproving one possible neutral explanation does not, of course, mean disproving all neutral explanations.[250] Therefore, it can be argued that at best I have made a plausible case for the lack of neutrality of the 1983 version of Rule 11, but not that I have proven it. Let us assume, for the moment, that this rebuttal to the claim of lack of neutrality is accurate. In the final section of this article, I take a different approach to this question of neutral rules. Neutrality presupposes a baseline from which we can measure deviations. Absent discussion of this baseline, the debate misses one of the central issues at stake. We need to consider whether there was a serious issue regarding too many frivolous civil rights cases. To answer that question, we have to consider another story not told in the Rule 11 studies.

V. A DIFFERENT PERSPECTIVE

So far I have accepted as true the proposition that there was a need for the 1983 version of Rule 11. I have attempted to analyze whether we can argue that the rule was not neutral because of its differential impact upon civil rights claims. There is however, another approach to the question of whether the 1983 version of Rule 11 was neutral. In several of his works, Professor Cass Sunstein has discussed how the conception of neutrality is linked to the idea of the appropriate baseline.[251] Sunstein defines a concept that he calls status quo neutrality.[252] This concept of neutrality treats the status quo and existing distributions of resources and entitlements as the baseline for deciding what is neutral.[253] For those who accept the idea of status quo neutrality, according to Sunstein, the government violates neutrality when it disturbs the existing situation.[254] Although Sunstein has described (and critiqued) the way in which the current situation becomes

250. For the other principal reason, see *supra* note 190.

251. *See* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 78 (1993) [hereinafter SUNSTEIN, PARTIAL CONSTITUTION]; Cass R. Sunstein, *Neutrality in Constitutional Law (With Special Reference To Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 6 (1992) [hereinafter Sunstein, *Neutrality*].

252. *See* SUNSTEIN, PARTIAL CONSTITUTION, *supra* note 251, at 78-79; Sunstein, *Neutrality*, *supra* note 251, at 5-6.

253. *See* SUNSTEIN, PARTIAL CONSTITUTION, *supra* note 251, at 78-79; Sunstein, *Neutrality*, *supra* note 251, at 5-6.

254. *See* SUNSTEIN, PARTIAL CONSTITUTION, *supra* note 251, at 40-41.

accepted as the natural baseline, his insights can be generalized to encompass the idea that in evaluating change and deciding whether that change is neutral, we have to first start with the legitimacy or neutrality of the current state of affairs.[255]

The assumption underlying the amended Rule 11 was that there was a need to remedy a problem. As stated at the beginning of this article, the problem had to do with the perception that there was a crisis in the federal courts. This crisis seemed to include two major ideas: (1) there were too many cases in the federal courts; and (2) there were too many frivolous cases.[256] We may dispute whether there was (or is) such a crisis with regard to caseload volume. Others have done that.[257] Assuming that there was, in fact, such a caseload crisis it can then be argued that promulgation of the 1983 amendment to Rule 11 was neutral. It originated in response to a genuine procedural problem and it was not passed to affect any particular class of substantive claims. However, even if we accept that there was a caseload problem that needed a remedy, what is interesting in reviewing the empirical studies done before passage of the 1983 amendments is that there was no study (or any data whatsoever) to show that "frivolous litigation" was a cause of the caseload "crisis" or even a problem.[258] By con-

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255. See Richard Delgado, *Rodrigo's Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law*, 45 STAN. L. REV. 1133 (1993), where the author states that:

> Well, I think it has to do with one's perspective, one's baseline. If you start out from a certain position, a given practice will look neutral. From a different perspective, the same practice will look one-sided, biased, unfair. For example, look at the quota issue. It's no secret that most conservatives dislike quotas for Blacks and other minority groups. Such schemes strike them as radically unfair, because they assure that a certain number of minorities will get jobs. Imposition of a quota seems nonneutral, because whites are treated differently from nonwhites. Without the quotas, that number would, no doubt, be much smaller. But that, in large part, is because in the absence of quotas the job criteria operate to hire artificially low numbers of Black and minority applicants. Genuinely equal treatment will strike some whites as unfair. Apparently, only advantage—a tilted playing field or criteria that favor them—seems neutral and normal. So, with any new arrangement we look to see who benefits, who is advantaged or disadvantaged, and pronounce regimes fair or unfair accordingly.

Id. at 1148 (citations omitted).

256. It is also possible that for some there was concern that the federal courts were involving themselves with the wrong kinds of cases. *See* Sally Engle Merry, *Disputing Without Culture*, 100 HARV. L. REV. 2057, 2072 (1987) (reviewing STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION (1985)) ("Proponents of the notion that the courts are too congested, and therefore that new alternatives are necessary, may be responding to the presence of new users in the courts who are considered undesirable and who present frustrating and unrewarding problems....").

257. *See, e.g.*, WOLF V. HEYDERBRAND & CARROLL SERON, RATIONALIZING JUSTICE: THE POLITICAL ECONOMY OF FEDERAL DISTRICT COURTS 4-5 (1990); Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986); Marc S. Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983); Sarat, *supra* note 36.

258. It is difficult to prove a negative. However, besides my own "search" of the literature I have relied on a bibliography. *See* Michael Chiorazzi et al., *Empirical Studies in Civil Procedure*, 51 LAW & CONTEMP. PROBS. 87 (1988); *See also* THIRD CIRCUIT REPORT, *supra* note 11, at 3 ("Empirical support for a uniform approach to the perceived abuses that prompted the proposal to amend the Rule ... was

trast, there were several studies showing that discovery, in certain types of cases, was a problem.[259]

I do not claim that none of the articles concerning the caseload crisis mentioned frivolous litigation. Rather, my argument is that although frivolous litigation may perhaps have been mentioned as one of a list of causes of the "crisis," it ranked comparatively lower than other factors, particularly discovery.[260] Two surveys done after the 1983 amendments further support the claim that frivolous litigation ranked low as a cause of the perceived caseload problems in the federal courts. The FJC Study reports that the majority of federal judges did not consider frivolous litigation to be a serious problem affecting their caseload.[261] The judges were asked: "Is there a problem with groundless litigation?"[262] Of the 583 judges who responded (a 78% response rate), 9.9% said that it was no problem; 64.6% considered groundless litigation to be a "very small or small" problem; 21.6% considered it to be a moderate problem; and only 3.8% considered groundless litigation to be a large problem.[263] In a Harris Poll of federal court trial judges, abuse of discovery process was thought to be a major cause of delay by 47% of the respondents and a minor cause of delay by 46% of the respondents.[264] In the same survey, frivolous suits and defenses were considered to be a major cause of delay by 21% of the judges and a minor cause by 70% of the judges.[265]

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ambiguous"), *and* RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 59-93 (1985) (analyzing, in chapter three of his book, what he considers to be the extent and causes of the caseload explosion, nowhere mentioning frivolous litigation appear as a cause).

259. *See* PAUL R. CONNOLLY ET AL., JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY (Federal Judicial Center, 1978); JOSEPH L. EBERSOLE & BARLOW BURKE, DISCOVERY PROBLEMS IN CIVIL CASES (Federal Judicial Ctr., 1980); Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787, 824-32; Wayne D. Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUND. RES. J. 217, 222-35; *see also* Bryant G. Garth, *Two Worlds of Civil Discovery: From Studies of Cost and Delay to the Markets in Legal Services and Legal Reform*, 39 B.C. L. REV. 597 (1998) (analyzing studies and concluding that there are two distinct worlds of civil discovery, with abuse being concentrated in high stakes, high conflict cases). *But see* Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1396-97 (1994) (arguing that the perception of widespread discovery abuse is based upon anecdote and questionable social science).

260. *See* Georgene Vairo, *Rule 11 and the Profession*, 67 FORDHAM L. REV. 589, 592 (1998); Kritzer & Zemans, *supra* note 102, at 536 n.2.

261. *See* FJC STUDY, *supra* note 13, § 2A, at 1-2.

262. *Id.* at 2.

263. *Id.*

264. *See* Louis Harris & Assoc., Inc., *Judges' Opinions on Procedural Issues: A Survey of State and Federal Judges Who Spend at Least Half Their Time on General Civil Cases*, 69 B.U. L. REV. 731, 735 (1989).

265. *See id.* at 752 tbl.8.2. Eighty-six percent of judges believed that discovery was a major cause of excessive costs; frivolous cases were not included in the survey as a possible cause of excessive costs. *See id.* at 752 tbl.8.2; *see also* Subrin, *supra* note 40, at 2021 n.117 (1989) (discussing that discovery is the most problematic area).

The discovery rules were amended in 1980, at least partially in response to some of the concerns voiced in the studies that showed discovery to be a problem area.[266] The 1983 amendments were the next attempt to deal with the perceived crisis. It was at this time that Rule 11 was amended and that it was claimed that a solution was necessary for the frivolous litigation problem.[267]

The research efforts since 1983 have been directed at determining whether the cure of the 1983 amendments caused more problems than it solved. The underlying definition of a "problem" was, however, less often questioned. One result of the 1983 amendments to Rule 11, therefore, was to place the question of solving the abusive litigation problem on the agenda.[268] Furthermore, by creating a solution to a perceived problem amended Rule 11 legitimized to some extent the idea that frivolous litigation was, indeed, a problem. In the years since 1983, frivolous litigation has remained high on the agenda of procedural problems that need to be solved. We do not know, however, to what extent the 1983 version of Rule 11 is a cause of or response to that agenda. What we do know is that the AJS Study found that lawyers who represent civil rights plaintiffs were more likely to be affected by Rule 11 than other lawyers.[269] The AJS Study stated that this effect was unrelated to the relative likelihood of being sanctioned.[270] This conclusion ignores the possibility that the effect upon civil rights lawyers was created by the publicity or perceptions about Rule 11 rather than its reality. Therefore, even if the disparate impact of the 1983 version of Rule 11 can be explained by "neutral" reasons, it may also be true that the effect of the rule was significant.[271] This effect occurred

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266. Justice Powell dissented from the adoption of these amendments because he felt they were too modest. *See* Amendments to the Federal Rules of Civil Procedure, 85 F.R.D. 521 (1980) (Powell, J., dissenting). Powell stated:

> I doubt that many judges or lawyers familiar with the proposed amendments believe they will have an appreciable effect on the acute problems associated with discovery . . . I do not dissent because the modest amendments recommended by the Judicial conference are undesirable. I simply believe that Congress' acceptance of these tinkering changes will delay for years the adoption of genuinely effective reforms.

Id. at 522-23. Discovery did become a major focal point of reform efforts during the 1990s. *See* Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747 (1998) (discussing what he calls the continual efforts to reform discovery since 1976). Currently, there are new proposed amendments to the discovery rules. These amendments will be presented to the Judicial Conference in Fall 1999.

267. The Advisory Committee Notes to the 1983 Amendments stated that: "Experience shows that in practice Rule 11 has not been effective in deterring abuses." FED. R. CIV. P. 11 (Advisory Committee Notes, 1983 Amendments) (citing 6 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1334 (1971)).

268. For the significance of agenda setting, see generally Mark Kessler, *Legal Mobilization for Social Reform: Power and the Politics of Agenda Setting*, 24 L. & SOC'Y REV. 121 (1990).

269. *See* AJS Study, *supra* note 13, at 971.

270. *See id.*

271. The 1983 version of Rule 11 was part of other trends toward cutting back access to the courts that contributed to "privatization" of our dispute resolution system. *See* Bryant G. Garth, *Privatization*

where the need for action, i.e. the need to deviate from the baseline of the status quo, was not proven. In this sense, the 1983 version of Rule 11 was not neutral.

VI. CONCLUSION

The Rule 11 studies are suggestive but not conclusive. It is not merely that they suffer from methodological problems. More significantly, even if we accept the conclusion that civil rights cases have been disproportionately singled out for disparate treatment, we still must interpret what that means. To a great extent that interpretation depends upon basic notions of what we mean by neutral procedures. It is also linked inescapably to our ideal of the relationship of procedure to substantive.

I have argued that one of the meanings of neutrality that we have adopted is closely related to the argument that procedural rules should be apolitical. In adopting this requirement for procedural rules, we expect those rules to treat differing substantive claims equally. I have further argued that showing improper motive ought not be necessary to argue that a procedural rule is not neutral. The advocates of the improper motive approach either adopted it out of concern about preserving the current rulemaking process or by borrowing from other areas of the law, particularly equal protection law. These analogies are not directly applicable. Even if one accepts my arguments, however, the studies do not provide sufficient data to conclude that the 1983 version of Rule 11 is non-neutral. What their data offer is a basis for recognizing that we need an explanation for the disparate impact of the 1983 version of Rule 11 upon civil rights claims. The principal explanation offered for this disparate impact is the claim that civil rights cases are more likely to be frivolous than other cases. At best, this response is inconclusive. We lack sufficient data to support it. But the response also entails a deeper problem: It assumes that the definition of a frivolous case is apolitical.

If we approach the question of neutrality from a different perspective, the key question becomes what in the years preceding 1983 led to the concern about frivolous litigation? Was it that federal courts were hearing too many cases or was it that the "wrong" kind of cases were getting into federal court? There may be no neutral way to answer such questions. Therefore, although the 1983 version of Rule 11 was the subject of constant attention, the important part of the Rule 11 story may not be its conclusion, that civil rights cases were being affected disproportionately, but rather that this story was being told at all.

None of the above means that the 1983 version of Rule 11 was or is

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and the New Formalism: Making the Courts Safe for Bureaucracy, 13 L. & SOC. INQUIRY 157, 165 (1989) (book review).

illegitimate. My own view is that it was ill-advised. What it does mean is that in considering whether it was appropriate or wise to adopt such a rule, we need to face directly the inevitable value choices that such a rule entails, regardless of whether the rule is being promulgated by a court's rulemaking process or a legislature. This is so regardless of which view of "neutrality" we adopt. That is what the Rule 11 studies teach us.